

CLERK'S COPY.

Vol. III

164  
TRANSCRIPT OF RECORD

469281  
L.C.

Supreme Court of the United States

OCTOBER TERM, 1940 1941

No. ~~481~~ 10

CITY OF INDIANAPOLIS, ET AL., PETITIONERS.

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,  
TRUSTEE, ETC., ET AL.

No. ~~482~~ 11

CITY OF INDIANAPOLIS, ET AL., PETITIONERS.

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,  
TRUSTEE, ETC., ET AL.

No. ~~483~~ 12

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,  
TRUSTEE, ETC., PETITIONER.

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.

No. ~~484~~ 13

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,  
TRUSTEE, ETC., PETITIONER.

vs.

THE INDIANAPOLIS GAS COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 12, 1940.

CERTIORARI GRANTED OCTOBER 28, 1940.

## **INDEX.**

---

Index to printed record of proceedings in U. S. District Court .....	i
Clerk's certificates to printed record of proceedings in U. S. District Court .....	284, 812a, 1239
Index to proceedings in U. S. Court of Appeals:	
Placita .....	1241
Certificate to exhibits .....	1241
Stipulation as to printing of record on appeal .....	1242
Plaintiff's Exhibit 139—Stipulation of facts .....	1265
Appearance for appellant, No. 7143, filed Nov. 22, 1939 .....	1272
Appearance for appellee, No. 7144, filed Nov. 27, 1939 .....	1273
Appearance for appellant, No. 7144, filed Nov. 28, 1939 .....	1274
Appearance for appellee, No. 7143, filed Dec. 26, 1939 .....	1275
Appearance for appellee, No. 7143, filed Dec. 26, 1939 .....	1276
Appearance for appellant, No. 7143, filed Dec. 28, 1939 .....	1277
Appearance for appellant, No. 7144, filed Dec. 28, 1939 .....	1278
Appearance for appellant, No. 7143, filed Jan. 17, 1940 .....	1278
Appearance for appellee, No. 7144, filed Jan. 17, 1940 .....	1279
Order taking causes under advisement entered April 12, 1940 .....	1280
Opinion by Kerner, J., filed June 6, 1940 .....	1281
Decree reversing, No. 7143, entered June 6, 1940 .....	1307
Decree reversing, No. 7144, entered June 6, 1940 .....	1308



Petition for rehearing filed June 20, 1940	1309
Petition for reargument filed June 20, 1940	1315
Stipulation relative to amplification of record filed July 10, 1940	1319
Exhibit A—Excerpt from Reporter's tran- script	1321
Exhibit B—Letter, Jan. 16, 1939, Burns to Baltzell	1324
Exhibit C—Letter, Jan. 16, 1939, Burns to Baltzell	1327
Exhibit D—Proposed form of order sub- mitted by Mr. Thompson at pre-trial con- ference	1330
Exhibit E—Excerpt from brief of plaintiff on Admissibility of Evidence to support allegations that the lease of Sept. 30, 1913 is or was burdensome	1331
Order of July 19, 1940, approving stipulation re amplification of record, etc.	1334
Order of July 19, 1940, amending opinion filed June 6, 1940	1335
Order of July 19, 1940, denying petition for re- hearing, etc.	1336
Order of July 19, 1940, staying mandates	1336
Stipulation as to printing of record	1337
Motion for leave to file petition for rehearing	1340
Petition for rehearing filed August 15, 1940	1343
Order of Aug. 15, 1940, granting leave to file second petition for rehearing and denial of same	1405
Praecipe for printing additional parts of record	1406
Clerk's certificate	1409
Order allowing certiorari	1410

IN THE

**United States Circuit Court of Appeals  
For the Seventh Circuit**

---

THE CHASE NATIONAL BANK OF THE CITY OF  
NEW YORK, TRUSTEE, ETC.,

*Plaintiff-Appellant,*

7143

*vs.*

CITIZENS GAS COMPANY OF INDIANAPOLIS,  
ET AL.,

*Defendants-Appellees.*

---

THE CHASE NATIONAL BANK OF THE CITY OF  
NEW YORK, TRUSTEE, ETC.,

*Plaintiff-Appellee,*

7144

*vs.*

THE INDIANAPOLIS GAS COMPANY,

*Defendant-Appellant.*

---

Appeals from the District Court of the United States for  
the Southern District of Indiana, Indianapolis Division.

## INDEX.

Placita . . . . .	a
Transcript of Record, Cause No. 6472, The Chase Nat. Bank of the City of New York, Trustee, Plaintiff- Appellant vs. Citizens Gas Co. of Indianapolis, et al., Defendants-Appellees, in U. S. Circuit Court of Appeals:	
Placita . . . . .	1
Bill of Complaint . . . . .	2
Exhibit A—Deed of Trust of The Indianap- olis Gas Co. to The Trust Co. of America and Ferdinand Winter, Trustees, dated Oct. 1, 1902 . . . . .	23
Exhibit B—Agreement of Lease by and be- tween The Indianapolis Gas Co. and Citi- zens Gas Co. of Indianapolis, dated Sept. 30, 1915 . . . . .	51
Exhibit C—Franchises, Articles of Incorpor- ation and By-Laws of Citizens Gas Com- pany of Indianapolis . . . . .	81
Exhibit D—Finding and Order of Public Service Commission of Indiana, dated Oct. 1, 1913 . . . . .	116
Exhibit E—Instrument of Transfer and As- signment of Personal Property of Citizens Gas Company of Indianapolis, dated Sept. 9, 1925 . . . . .	122
Exhibit F—Assignment of Lease by Citizens Gas Co. to City of Indianapolis . . . . .	127
Exhibit G—Resolution for Rejection of As- signment of Lease between The Indianap- olis Gas Co. and Citizens Gas Company of Indianapolis . . . . .	130

Subpoena in Equity .....	133
Marshal's Return .....	135
Alias Subpoena in Equity .....	135
Marshal's Return .....	135
Answer of Defendant The Indianapolis Gas Co..	137
Answer and Counterclaim of defendants City of Indianapolis et al. ....	141
Exhibit A—Notice of Indianapolis Gas Plant Revenue Bond Offering.....	188
Exhibit B—Halsey Stuart & Co. Information Circular .....	192
Exhibit C—Resolution for Temporary Use of Property of The Indianapolis Gas Com- pany Adopted Sept. 9, 1935.....	200
Exhibit D—Letter dated Sept. 30, 1935, The Indianapolis Gas Company to Thompson, Rabb & Stevenson .....	204
Exhibit E—Letter dated March 2, 1936, City of Indianapolis to The Indianapolis Gas Co., and acceptance .....	205
Order of Oct. 22, 1936, granting Motion for Leave to Amend Answer .....	208
Amendment to Answer and Counterclaim of de- fendants The City of Indianapolis et al. ....	209
Plaintiff's Answer to Counterclaim of defendants The City of Indianapolis et al. ....	212
Reply of The Indianapolis Gas Co. to Counter- claim of Co-defendants .....	215
Answer and Counterclaim of defendant Citizens Gas Co. ....	221
Reply of Citizens Gas Co. to Counterclaim of de- fendants The City of Indianapolis, et al. ....	239
Reply of The City of Indianapolis et al. to Coun- terclaim of Citizens Gas Co. ....	242

Plaintiff's Answer to Counterclaim of defendant Citizens Gas Co. ....	245
Answer of defendant Indianapolis Gas Co. to Counterclaim of defendant Citizens Gas Co....	249
Request of defendants The City of Indianapolis et al. for Separate Determination of Question of Jurisdiction .....	254
Order of July 26, 1937, dismissing Bill of Com- plaint and Counterclaim for Want of Jurisdic- tion and granting plaintiff leave to serve an — Amended Bill of Complaint within thirty days; etc. ....	255
Order of Aug. 18, 1937, granting leave to file Amendment and Supplement to Bill of Com- plaint, and Waiver of Summons and Service thereof .....	256
Amendment and Supplement to Bill of Complaint	256
Exhibit H—(Reference to) Contract dated March 2, 1936, identical with Exhibit E to Answer and Counterclaim, see page 205..	261
Waiver of Notice and Service of Amendment and Supplement to Bill .....	261
Answer of defendant The Indianapolis Gas Co...	263
Answer of City of Indianapolis et al. to Amend- ment and Supplement to Bill.....	266
Order of Sept. 15, 1937, making Joseph H. Mc- Duffee and Leroy J. Keach parties defendant..	269
Answer of Citizens Gas Co. to Amendment and Supplement to Bill .....	270
Decree entered Nov. 15, 1937.....	271
Petition for Appeal .....	272
Assignment of Errors .....	273
Order of Nov. 27, 1937, allowing Appeal.....	275
Bond on Appeal .....	276

Praecepta for Record .....	278
Certificate of Clerk .....	281
Citation .....	282
Opinion of U. S. Circuit Court of Appeals, filed Apr. 8, 1938, Cause No. 6472.....	285
Dissenting Opinion .....	293
Mandate of U. S. Circuit Court of Appeals issued Oct. 22, 1938, Cause No. 6472 .....	294
Order of Oct. 28, 1938, setting aside order of Nov. 15, 1937, and assigning cause for trial.....	295
Order of Dec. 22, 1938, granting motion for leave to file second amendment and supplement to bill of complaint .....	296
Second amendment and supplement to bill of com- plaint .....	296
Exhibit J—Indemnity agreement given by City of Indianapolis to Citizens Gas Co., dated Sept. 9, 1935 .....	306
Answer of Citizens Gas Co. to second amendment and supplement to bill of complaint.....	308
Answer of Indianapolis Gas Co. to second amendment and supplement to bill of complaint.....	311
Answer of City of Indianapolis, et al. to second amendment and supplement to bill of complaint....	314
Motion to strike immaterial matter from answer and counterclaim of defendants City of Indianapolis, et al., and order of Jan. 14, 1939, overruling same .....	317-320
Order of Jan. 18, 1939, granting leave to amend one paragraph of defendants' answer.....	320
Amendment and supplement to answering defendants' answer and counterclaim .....	320
Order of Jan. 18, 1939 re issues to be tried, etc.....	321
Order of Mar. 2, 1939, substituting certain parties defendant .....	322

## TRANSCRIPT OF PROCEEDINGS.

Colloquy .....	324, 424, 476
Certain plaintiff's evidence offered.....	325
Plaintiff's Witnesses:	
Beardslee, Paul C.....	401, 413, 471
Brown, Arthur V.....	411
Crosier, Paul E.....	348
Gauding, Alfred F.....	339
Hill, George .....	395
Jewett, Chester A.....	351
Payne, Gavin L.....	341
Seiter, Victor C.....	472
Vonnegut, Franklin .....	336
Yule, William J.....	363, 421
Certain defendants' evidence offered.....	424
Defendants' Witnesses:	
Elsey, Brodehurst .....	435
Higgins, William R.....	434
Matson, Frederick E.....	454
Rowe, H. S. Payson.....	460
Sparks, William G.....	464
Yule, William J.....	423, 463
Deposition of Robert E. Simond (Plaintiff's Exhibit 133) .....	483
Plaintiff's Deposition Exhibit 101—Subpoena duces tecum to R. E. Simond.....	521
Plaintiff's Deposition Exhibit 102 (Reference to)	523
Plaintiff's Deposition Exhibit 103—Excerpt from Halsey Stuart Co. sales memorandum.....	524
Plaintiff's Deposition Exhibit 104—Newspaper advertisement in Indianapolis Times of July 1, 1935 of Gas Plant Revenue Bonds.....	526

Plaintiff's Deposition Exhibit 105—Newspaper advertisement in Indianapolis Star of July 8, 1935 of Gas Plant Revenue Bonds.....	528
Plaintiff's Deposition Exhibit 106 (Reference to)	529
Plaintiff's Deposition Exhibit 107—Letter, Sept. 20, 1935, Halsey Stuart & Co. to Todd.....	530
Plaintiff's Deposition Exhibit 108—Letter, Dec. 7, 1936, Halsey Stuart & Co. to Todd.....	531
Plaintiff's Deposition Exhibit 109—Letter, Dec. 4, 1936, Todd to Halsey Stuart & Co.....	532
Plaintiff's Deposition Exhibit 110—Statement pertaining to proposed issue of Indianapolis Gas Plant Revenue Bonds.....	533
Plaintiff's Deposition Exhibit 111—Letter, June 27, 1935, Simond to Thompson, Rabb & Stevenson .....	536
Plaintiff's Deposition Exhibit 112—Telegram, June 28, 1935, Thompson, Rabb & Stevenson to Halsey Stuart & Co.....	537
Plaintiff's Deposition Exhibit 113—Letter, June 28, 1935, Rabb to Simond.....	537
Plaintiff's Deposition Exhibit 114—Draft of Halsey Stuart & Co. circular advertising City of Indianapolis Gas Plant Revenue Bonds.....	538
Plaintiff's Deposition Exhibit 115—(Reference to) .....	547
Plaintiff's Deposition Exhibit 116—List of newspapers in which advertisements of City of Indianapolis Gas Plant Revenue Bonds appeared	547
Plaintiff's Deposition Exhibits 116-A-B—(Reference to) .....	548
City Deposition Exhibit 2—Letter, Sept. 25, 1935, Thompson, Rabb & Stevenson to Simond.....	549
City Deposition Exhibit 3—Letter, Sept. 23, 1935, Simond to Rabb.....	549



## TRANSCRIPT OF PROCEEDINGS.

Colloquy . . . . .	324, 424, 476
Certain plaintiff's evidence offered . . . . .	325
Plaintiff's Witnesses:	
Beardslee, Paul C. . . . .	401, 413, 471
Brown, Arthur V. . . . .	411
Crosier, Paul E. . . . .	348
Gauding, Alfred F. . . . .	339
Hill, George . . . . .	395
Jewett, Chester A. . . . .	351
Payne, Gavin L. . . . .	341
Seiter, Victor C. . . . .	472
Vonnegut, Franklin . . . . .	336
Yule, William J. . . . .	363, 421
Certain defendants' evidence offered . . . . .	424
Defendants' Witnesses:	
Elsley, Brodehurst . . . . .	435
Higgins, William R. . . . .	434
Matson, Frederick E. . . . .	454
Rowe, H. S. Payson . . . . .	460
Sparks, William G. . . . .	464
Yule, William J. . . . .	423, 463
Deposition of Robert E. Simond (Plaintiff's Exhibit	
133) . . . . .	483
Plaintiff's Deposition Exhibit 101—Subpoena	
duces tecum to R. E. Simond . . . . .	521
Plaintiff's Deposition Exhibit 103—Excerpt from	
Halsey Stuart Co. sales memorandum . . . . .	524
Plaintiff's Deposition Exhibit 104—Newspaper	
advertisement in Indianapolis Times of July 1,	
1935 of Gas Plant Revenue Bonds . . . . .	526

Plaintiff's Deposition Exhibit 105—Newspaper advertisement in Indianapolis Star of July 8, 1935 of Gas Plant Revenue Bonds.....	528
Plaintiff's Deposition Exhibit 107—Letter, Sept. 20, 1935, Halsey Stuart & Co. to Todd.....	530
Plaintiff's Deposition Exhibit 108—Letter, Dec. 7, 1936, Halsey Stuart & Co. to Todd.....	531
Plaintiff's Deposition Exhibit 109—Letter, Dec. 4, 1936, Todd to Halsey Stuart & Co. ....	532
Plaintiff's Deposition Exhibit 110—Statement pertaining to proposed issue of Indianapolis Gas Plant Revenue Bonds.....	533
Plaintiff's Deposition Exhibit 111—Letter, June 27, 1935, Simond to Thompson, Rabb & Stevenson .....	536
Plaintiff's Deposition Exhibit 112—Telegram, June 28, 1935, Thompson, Rabb & Stevenson to Halsey Stuart & Co. ....	537
Plaintiff's Deposition Exhibit 113—Letter, June 28, 1935, Rabb to Simond .....	537
Plaintiff's Deposition Exhibit 114—Draft of Halsey Stuart & Co. circular advertising City of Indianapolis Gas Plant Revenue Bonds.....	538
Plaintiff's Deposition Exhibit 115—(Reference to) .....	547
Plaintiff's Deposition Exhibit 116—List of newspapers in which advertisements of City of Indianapolis Gas Plant Revenue Bonds appeared	547
Plaintiff's Deposition Exhibits 116-A-B—(Reference to) .....	548
City Deposition Exhibit 2—Letter, Sept. 25, 1935, Thompson, Rabb & Stevenson to Simond.....	549
City Deposition Exhibit 3—Letter, Sept. 23, 1935, Simond to Rabb .....	549

City Deposition Exhibit 4—Letter, Sept. 21, 1935, Thompson, Rabb & Stevenson to Simond.....	551
City Deposition Exhibit 5—Letter, Sept. 18, 1935, Halsey Stuart & Co. to Rabb.....	552
Deposition of Chester M. Clark (Plaintiff's Exhibit 134) .....	553
Deposition of Joseph Edwards Baker (Plaintiff's Ex- hibit 134) .....	568
Plaintiff's Deposition Exhibit 3—Blodget & Co. advertisement (1921) of Indianapolis Gas Bonds .....	592
Plaintiff's Deposition Exhibit 4—Blodget & Co. advertisement (1925) of Indianapolis Gas Bonds .....	595
Plaintiff's Deposition Exhibit 5—Blodget & Co. advertisement (1926) of Indianapolis Gas Bonds .....	596
Plaintiff's Deposition Exhibit 6—Blodget & Co. advertisement (1926) of Citizens Gas Co. Bonds .....	598
Plaintiff's Deposition Exhibit 7—Blodget & Co. advertisement (1922) of Bonds of Citizens Gas Co. and Indianapolis Gas Co. ....	599
Plaintiff's Deposition Exhibit 8—Blodget & Co. advertisement (1924) of Bonds of Citizens Gas Co. and Indianapolis Gas Co. ....	602
Plaintiff's Deposition Exhibit 9—Blodget & Co. advertisement (1916) of Indianapolis Gas Bonds .....	604
Plaintiff's Deposition Exhibit 10—Blodget & Co. advertisement (1915) of Citizens Gas Co. Bonds .....	607

## PLAINTIFF'S EXHIBITS.

Exhibit No. 1—Stipulation of facts .....	616
Stipulation Exhibit No. 5—Minutes of meeting of Board of Directors of Citizens Gas Co. held Feb. 26, 1913 .....	640
Stipulation Exhibit No. 6—Minutes of meeting of Board of Trustees of Citizens Gas Co. held Feb. 26, 1913 .....	646
Stipulation Exhibit No. 7—Minutes of meeting of Board of Trustees of Citizens Gas Co. held Sept. 30, 1913 .....	647
Stipulation Exhibit No. 13—Excerpt from Complaint, Case of Fishback vs. Public Service Commission of Indiana, et al. ....	648
Stipulation Exhibit No. 14—Excerpt from Amended Second to Tenth Paragraphs of Complaint, Case of Fishback vs. Public Service Commission of Indiana, et al. ....	662
Stipulation Exhibit No. 20—Tabulation, "Citizens Gas Co., Lessee—Indianapolis Gas Co., Lessor—Sum- marized Statement of Sums Paid by Citizens Gas Co. to or for the benefit of Indianapolis Gas Co."...	669
Stipulation Exhibit No. 22—Resolution of Board of Public Works, dated Mar. 20, 1929.....	670
Stipulation Exhibit No. 23—First Resolution of Board of Directors of Citizens Gas Co. adopted Apr. 3, 1929 .....	672
Stipulation Exhibit No. 24—Second Resolution of Board of Directors of Citizens Gas Co. adopted Apr. 3, 1929 .....	674
Stipulation Exhibit No. 30—Bill of complaint filed in Case of Todd vs. Citizens Gas Co., et al.....	676

Stipulation Exhibit No. 31—Answer of defendants City of Indianapolis, et al. to bill of complaint, Case of Todd vs. Citizens Gas Co., et al. ....	718
Stipulation Exhibit No. 32—Motion to strike out por- tions of answers of City of Indianapolis, et al. in Case of Todd vs. Citizens Gas Co., et al. ....	756
Stipulation Exhibit 35—Bill of complaint filed in Wil- liams Case .....	761
Stipulation Exhibit No. 36—Supplemental complaint in Williams Case .....	802
Stipulation Exhibit No. 37—Motion of certain defend- ants to strike out portions of complaint, Williams Case .....	804
Stipulation Exhibit No. 38—Demurrer of City of In- dianapolis, et al. in Williams Case .....	813
Stipulation Exhibit No. 39—Demurrer and support- ing memorandum of Indianapolis Gas Co. and Mort- gage Trustee, Williams Case .....	815
Stipulation Exhibit No. 40—Demurrer of Public Serv- ice Commission, in Williams Case .....	817
Stipulation Exhibit No. 47—Resolution of Board of Directors for Utilities re offering of Gas Plant Revenue Bonds, adopted May 7, 1935 .....	822
Stipulation Exhibit No. 48—Resolution of Board of Directors for Utilities of City of Indianapolis, adepted Aug. 9, 1935 .....	830
Stipulation Exhibit No. 49—Notice of payment of Citi- zens Gas Co. Mortgage Bonds, Aug. 10, 1935 .....	832
Stipulation Exhibit No. 50—Notice of payment of Citi- zens Gas Co. Mortgage Bonds, Sept. 9, 1935 .....	832
Stipulation Exhibit No. 55—Deed, Sept. 9, 1935, Citi- zens Gas Co. to City of Indianapolis .....	833
Stipulation Exhibit No. 56—Assignment of Lease by Citizens Gas Co. to City of Indianapolis, dated Sept. 9, 1935 (Majestic Bldg.) .....	835

Stipulation Exhibit No. 58—Letter, July 23, 1935, Thompson, Rabb & Stevenson to Indianapolis Gas Co. ....	836
Stipulation Exhibit No. 59—Letter, Aug. 31, 1935, Thompson, Rabb & Stevenson to A. V. Brown and L. E. Ewbank .....	837
Stipulation Exhibit No. 66—Letter, Sept. 30, 1935, In- dianapolis Gas Co. to Thompson, Rabb & Stevenson.	838
Stipulation Exhibit 67—Letter, Sept. 30, 1935, Thompson, Rabb & Stevenson to Indianapolis Gas..	839
Stipulation Exhibit 75—Letter, Feb. 8, 1936, In- dianapolis Gas to Board of Directors for Utilities.	839
Stipulation Exhibit 76—Letter, Feb. 10, 1936, Board of Directors for Utilities to Indianapolis Gas.	840
Stipulation Exhibits 86 and 87—Resolutions of Board of Directors and Board of Trustees of Citi- zens Gas Co., adopted Sept. 9, 1935.....	842
Exhibit 88—Certificate of Secretary of Public Service Commission .....	846
Exhibit 89—Answer of City of Indianapolis, et al. in Cotter Case .....	847
Exhibit 90—Circular Advertising Citizens Gas Co. Stock (1919) .....	879
Exhibit 91—Letter, June 7, 1913, Citizens Gas to its Stockholders .....	886
Exhibits 92, 93 and 94—Reports of Citizens Gas Co. for six months ending June 30, 1913; for year end- ing Dec. 31, 1913 and for six months ending June 30, 1914 .....	897
Exhibit 95-A—Excerpt from Poor's Manual, 1915....	905
Exhibit 96-A—Excerpt from Poor's Manual, 1922....	907
Exhibit 97-A—Excerpt from Poor's Manual, 1935...	909
Exhibit 98-A—Excerpt from Moody's Manual, 1923..	912
Exhibits 99 to 109—Excerpts from Moody's Manuals, 1924 to 1934 (Reference to) .....	915

Exhibit 110—Excerpt from Moody's Manual, 1935...	915
Exhibit 111-A—Letter, July 19, 1935, Chase National Bank to Indianapolis Gas.....	922
Exhibit 111-B—Letter, July 17, 1935, Scudder, Stevens & Clark to Chase National Bank.....	923
Exhibit 111-C—Letter, Aug. 17, 1935, Indianapolis Gas to Scudder, Stevens & Clark.....	923
Exhibit 112—Letter, Sept. 6, 1935, Chase National Bank to Indianapolis Gas.....	924
Exhibit 112-A—Letter, Sept. 4, 1935, Russell, Berg & Company to Chase National Bank.....	925
Exhibit 113—Letter, Sept. 19, 1935, Chase National Bank to Indianapolis Gas.....	926
Exhibit 114—Telegram, Oct. 1, 1935, Chase National Bank to Indianapolis Gas.....	927
Exhibit 115—Letter, Oct. 3, 1935, Chase National Bank to Indianapolis Gas.....	927
Exhibit 116—Letter, Nov. 7, 1935, Indianapolis Gas to Chase National Bank.....	928
Exhibit 117—Letter, Dec. 2, 1935, Chase National Bank to Indianapolis Gas.....	929
Exhibit 118—Letter, Feb. 26, 1936, Chase National Bank to Indianapolis Gas.....	930
Exhibit 119—Letter, March 2, 1936, Indianapolis Gas to Chase National Bank.....	930
Exhibit 120—Letter, Nov. 1, 1935, Citizens Gas & Coke Utility to Chase National Bank.....	931
Exhibit 120-A—Invoice from Chase National Bank...	932
Exhibit 121—Letter, March 26, 1936, Indianapolis Gas to Chase National Bank.....	933
Exhibit 122—Tabulation "Additions and Betterments to Plant and System of Indianapolis Gas Co. Reported by Citizens Gas & Coke Utility".....	934
Exhibits 123-A, 123-B and 123-C—Minutes of meeting of Board of Directors Indianapolis Gas Co., May 12, 1936.....	935



Exhibit 124—Report of Citizens Gas, Year Ending Dec. 31, 1913 (Reference to) .....	936
Exhibit 125—Letter, Apr. 16, 1936, Massachusetts Mutual Life Ins. Co. to Chase Nat. Bank.....	937
Exhibit 126—Letter, Apr. 17, 1936, New England Mu- tual Life Ins. Co. to Chase Nat. Bank.....	939
Exhibits 127 to 130—(Reference to) .....	940
Exhibit 131—Letter, Oct. 21, 1935, Citizens Gas & Coke Utility to Chase Nat. Bank.....	940
Exhibit 132—Letter, May 1, 1936, Indianapolis Gas Co. to Chase Nat. Bank .....	941
Exhibit 133—Deposition of Robert E. Simond.....	483
Plaintiffs' deposition exhibits.....	521 to 548
City deposition exhibits .....	549 to 552
Exhibit 134—Deposition of Chester M. Clark.....	553
Deposition of Joseph Edwards Baker.....	568
Plaintiff's deposition exhibits.....	592 to 607
Exhibit 135—Appellees' Brief filed in Supreme Court of Indiana in Williams Case.....	950
Exhibits 136-137-138—(Reference to) .....	965
Exhibit 139—Stipulation of facts in Todd Case.....	941

### CITY'S EXHIBITS.

Stipulation Exhibit 60—Letter, Sept. 9, 1935, Thomp- son, Rabb & Stevenson to Indianapolis Gas Co.....	965
Stipulation Exhibit 61—Letter, Sept. 24, 1935, Board of Directors for Utilities of City of Indianapolis to Indianapolis Gas Co. ....	965
Stipulation Exhibit 63—Letter, Sept. 27, 1935, Board of Directors for Utilities of City of Indianapolis to Indianapolis Gas Co. ....	967
Stipulation Exhibit 64—Letter, Sept. 30, 1935, Board of Directors for Utilities to Indianapolis Gas.....	968
Stipulation Exhibit 65—Letter, Sept. 30, 1935, Indian- apolis Gas to Board of Directors for Utilities.....	969



Stipulation Exhibit 68—Letter, Oct. 10, 1935, Thompson, Rabb & Stevenson to Indianapolis Gas.....	970
Stipulation Exhibit 69—Letter, Jan. 6, 1936, Thompson, Rabb & Stevenson to Indianapolis Gas.....	972
Stipulation Exhibit 70—Resolution, Board of Directors For Utilities, Jan. 3, 1936.....	973
Stipulation Exhibit 77—Letter, Feb. 10, 1936, Thompson to Ewbank .....	973
Stipulation Exhibit 78—Letter, March 20, 1936, Thompson, Rabb & Stevenson to Indianapolis Gas.....	974
Stipulation Exhibit 79—Letter, April 6, 1936, Indianapolis Gas to Thompson, Rabb & Stevenson.....	975
Stipulation Exhibit 80—Letter, April 8, 1936, Thompson, Rabb & Stevenson to Indianapolis Gas.....	976
Stipulation Exhibit 81—Letter, May 12, 1936, Indianapolis Gas to Thompson, Rabb & Stevenson.....	977
Stipulation Exhibit 82—Letter, May 23, 1936, Thompson, Rabb & Stevenson to Indianapolis Gas.....	978
Stipulation Exhibit 83—Letter, May 25, 1936, Indianapolis Gas to Thompson, Rabb & Stevenson.....	978
Stipulation Exhibit 84—Letter, June 3, 1936, Indianapolis Gas to Thompson, Rabb & Stevenson.....	979
Stipulation Exhibit 85—Letter, Sept. 30, 1936, Board of Directors for Utilities to Indianapolis Gas.....	980
Exhibit B—Contract of March 2, 1936, and Ratifications Thereof (Excerpt from) .....	981
Exhibit 1—Certificate Concerning Records of Common Council of Indianapolis .....	982
Exhibit 2—Certificate Concerning Records of Board of Public Works .....	983
Exhibit 3—Certificate Concerning Records of Board of Trustees for Utilities .....	984
Exhibit 4—Certificate Concerning Records of Board of Directors for Utilities .....	985
Exhibits 5-A-B—Interrogatories propounded to Indianapolis Gas Co., and Answers thereto.....	987 to 993

Statements relative to exhibits attached to Answers to Interrogatories .....	993
Exhibits 6-A-B—Interrogatories propounded to plaintiff, Chase Nat. Bank, and Answers thereto....	996 to 999
Exhibits attached to Answers to Interrogatories:	
No. 4—Letter, May 4, 1937, Beardslee to Indianapolis Gas Co. ....	1000
No. 5—Letter, May 12, 1937, Indiana Nat. Bank to Beardslee .....	1001
No. 6—Letter, Nov. 19, 1937, Beardslee to Indianapolis Gas Co. ....	1001
No. 7—Letter, Nov. 23, 1937, Indianapolis Gas Co. to Beardslee .....	1002
No. 8—Letter, Apr. 11, 1938, Beardslee to Indiana Nat. Bank .....	1002
No. 9—Letter, Apr. 15, 1938, Indiana Nat. Bank to Beardslee and statement of account.	1003
No. 10—Letter, Apr. 18, 1938, Beardslee to Indianapolis Gas Co. ....	1004
No. 11—Letter, Apr. 20, 1938, Indianapolis Gas Co. to Beardslee.....	1005
No. 12—Letter, Apr. 27, 1938, Indianapolis Gas Co. to Beardslee.....	1007
No. 12-A—Letter, Oct. 26, 1938, Beardslee to Indiana Nat. Bank .....	1008
No. 12-B—Letter Oct. 29, 1938, Indiana Nat. Bank to Beardslee .....	1008
Nos. 13 to 45—(Reference to) .....	1009
Exhibit 7A—Minutes of Indianapolis Gas Board, Sep. 26, 1935 .....	<del>1009</del> 1010
Exhibit 7B—Minutes of Indianapolis Gas Board, Sept. 30, 1935 .....	1011
Exhibit 7C—Minutes of Indianapolis Gas Board, Nov. 6, 1935 .....	1013

Exhibit 7D—Minutes of Indianapolis Gas Board, March 4, 1936 .....	1014
Exhibit 7E—Minutes of Indianapolis Gas Board, April 3, 1936 .....	1015
Exhibit 7G—Minutes of Indianapolis Gas Board, June 3, 1936 .....	1016
Exhibit 8—Ordinance of City of Indianapolis, Oct. 21, 1935 .....	1017
Exhibit 9—(Reference to) .....	1019
Exhibit 10—Utility District General Ledger Sheets...	1020
Exhibit 11—Transcript of Proceedings re Sale of Gas Plant Revenue Bonds .....	1032
Exhibit 12—Minutes of Board of Directors for Utilities, Sept. 9, 1935 .....	1037
Exhibit 13—Letter, Sept. 10, 1935, Smith, Remster, Hornbrook & Smith to Thompson, Rabb & Steven- son .....	1043
Exhibits 28A and 28B—Letter, Jan. 4, 1937, Thompson, Rabb & Stevenson to Halsey, Stuart & Co.....	1043
Exhibit 29—Objections by defendants City of Indian- apolis, et al. to certain parts of stipulation and cer- tain exhibits attached thereto.....	1045
Exhibit 30—Typewritten Statement Offering Various Exhibits on Behalf of Plaintiffs (Reference to)....	1056
Order of Apr. 7, 1939, ruling on admissibility of cer- tain evidence, etc. ....	1057
Approval of exhibits .....	1058
Request of The Chase National Bank, Trustee, for find- ings of fact and conclusions of law.....	1059
Request of City of Indianapolis for findings of fact and conclusions of law .....	1078
Request of Citizens Gas Co. for findings of fact and conclusions of law .....	1104
Request of Indianapolis Gas Co. for findings of fact and conclusions of law .....	1107

Memorandum by Baltzell, J., filed Sept. 21, 1939 .....	1122
Special findings of fact .....	1160
Conclusions of law .....	1190
Decree, entered Sept. 21, 1939 .....	1192
Notice of appeal by plaintiff .....	1194
Bond on appeal of plaintiff .....	1194
Statement of points on which plaintiff-appellant in- tends to rely .....	1196
Notice of appeal by defendant .....	1212
Bond on appeal of defendant .....	1213
Statement of points on which defendant-appellant in- tends to rely .....	1214
Order of Oct. 28, 1939, relative to exhibits .....	1229
Stipulation as to matter to be included in record on appeal .....	1229
Order of Nov. 16, 1939, extending time for docketing action and filing record in U. S. Circuit Court of Appeals .....	616
Certificate of Clerk .....	1236
Stipulation as to printing of record .....	1237

1173 PLAINTIFFS' STIPULATION EXHIBIT 38.

Demurrer of City of Indianapolis et al., in *Williams Case*.

This demurrer and the supporting memorandum is copied on pages 232-235, inclusive, of the Appellants' Brief in the Supreme Court of Indiana in the case of *Williams vs. Citizens Gas Company, et al.*, Plaintiffs' Exhibit 3 for Identification, which original exhibit is included in this transcript by order of the Court.

Come now defendants, Citizens Gas Company of Indianapolis, a corporation; Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymson, Edward H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg, Paul T. Crosier; City of Indianapolis in the State of Indiana, a Municipal Corporation; Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goett, as City Clerk of said City of Indianapolis; E. Kirk McKinney, Louis C. Brandt, Charles O. Britton, as the Board of Public Works of said City of Indianapolis; Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis; Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, Almus G. Ruddell and Guy A. Wainwright, as the Board of Directors for Utilities of said City of Indianapolis and separately and severally demur to plaintiff's complaint herein, and for ground of demurrer say that said complaint does not state facts sufficient to constitute a cause of action; and said defendants file herewith a memorandum, stating wherein said complaint is insufficient for want of facts, and make said memorandum a part thereof.

Tr. p. 313.

The memorandum filed with the demurrer of said Citizens Gas Company et als., was in substance, to wit:

"The complaint herein is insufficient in each of the following particulars, to wit:

"1. The plaintiff who sues only as a citizen and taxpayer has no right, either alone or as a representative of other private citizens, to maintain an action seeking to enforce a Public Charitable Trust in the property of the

defendant, Citizens Gas Company of Indianapolis, or to attempt to prevent claimed diversions therefrom, or to procure the appointment of a receiver therefor.

"2. It having been judicially established that the property of the Citizens Gas Company is a valid Public Charitable Trust, neither the plaintiff nor any other private citizen or taxpayer has any authority in law to maintain an action to sequester the property of said trust, to procure the appointment of a receiver therefor, or to prevent alleged diversions of said trust property. Such a suit can only be maintained by the proper public officer authorized to represent the interests of the public in said Public Charitable Trust.

"3. No interest is shown to exist in the plaintiff, or in the class on whose behalf he attempts to sue, sufficient to justify the maintenance of this action by plaintiff.

"4. Where as here, there is a valid subsisting Public Charitable Trust being administered by the duly constituted Trustee, no suit can be maintained for the purpose of sequestering the trust property, appointing a receiver thereof, attempting to prevent alleged diversions from said trust, attempting to require the restoration of funds and property claimed improperly to have been diverted from said trust or generally to enforce said trust except by a public officer duly authorized to represent the public interest in such trust. The Prosecuting Attorney of the Nineteenth Judicial Circuit or the Attorney General of Indiana are the only public officers having the right to represent the public in this connection and the plaintiff therefore has no right to maintain this action merely as a private individual and taxpayer either on behalf of himself or others of the same class.

"5. No facts are alleged showing any ground whatever for the appointment of a receiver for the property of the defendant, Citizens Gas Company of Indianapolis, which constitutes a valid Public Charitable Trust.

"6. No facts are alleged showing or tending to show that a cloud exists on the interest of the Public Charitable Trust in the plant and property of defendant, Citizens Gas Company of Indianapolis.

"7. It appears that the existence of a Public Charitable Trust in the plant and property of defendant, Citizens Gas Company of Indianapolis, has been finally and conclusively established by a court of competent jurisdiction in a suit to which said Citizens Gas Company of Indianapolis and the City of Indianapolis were parties, and

neither the plaintiff nor any other person has any right to relitigate the question of the existence or the validity of such Public Charitable Trust."

1174 PLAINTIFFS' STIPULATION EXHIBIT 39.

Allen G. Williams *vs.* Citizens Gas Company.

Demurrer and Supporting Memorandum of The Indianapolis Gas Company and the Mortgage Trustee.

"The defendants, Indianapolis Gas Company, a corporation, and Ferdinand Winter and Trust Company of America, as trustees under a mortgage executed by said Indianapolis Gas Company, separately and severally demur to plaintiff's complaint herein and for ground of demurrer say that said complaint does not state facts sufficient to constitute a cause of action; and said defendants file herewith a memorandum stating wherein said complaint is insufficient for want of facts, and make said memorandum a part hereof.

"The complaint herein is insufficient in each of the following particulars, to wit:

"1. The plaintiff who sues only as a citizen and taxpayer has no right, either alone or as a representative of other private citizens to maintain an action seeking to enforce an alleged charitable trust in the property of the defendant Citizens Gas Company of Indianapolis, or to attempt to prevent claimed diversions therefrom or to procure the appointment of a receiver for any corporation on account thereof.

"2. In so far as this is a suit by one of the general public to declare and enforce a Public Charitable Trust, or to sequester the property of such trust, to procure the appointment of a Receiver therefor, or to prevent alleged diversions of such trust property, it cannot be maintained, except only by the proper public officer authorized to represent the interests of the public in said Public Charitable Trust.

"3. No necessity is shown to exist in the plaintiff or in the class on whose behalf he attempts to sue, sufficient to justify the maintenance of this action by the plaintiff.

"4. Upon the allegations that there is a valid subsisting Public Charitable Trust being administered by the



duly constituted trustee pending its transfer to the City of Indianapolis as a subsequent trustee, no suit can be maintained for the purpose of sequestering the trust property, or appointing a receiver for such purpose, or attempting to prevent alleged diversions from said trust, or attempting to require the restoration of funds and property claimed to have been improperly diverted from said trust or generally to enforce said trust except by a public officer duly authorized to represent the public interest in such trust, and the prosecuting attorney of the 19th Judicial Circuit or the Attorney General of Indiana are the only public officers having the right to represent the public in such an action and the plaintiff, 1175 therefore, has no right to maintain this action merely as a private individual and taxpayer either on behalf of himself or of others of the same class.

"5. No facts are alleged showing any ground whatever for the appointment of a receiver for the property of the defendant Indianapolis Gas Company, whether as constituting a portion of the assets of a Public Charitable Trust or otherwise.

"6. It appearing from the facts alleged in the complaint that the lease by the Indianapolis Gas Company of its property to the Citizens Gas Company was duly approved by the Public Service Commission and that the Citizens Gas Company has held the leased property thereunder for more than fifteen years and is still holding and enjoying the use of the same, such lease is not open to collateral attack at the suit of a private citizen and taxpayer who has no interest in either company except as an alleged beneficiary under the Public Charitable Trust which attaches to the property of the lessee.

"7. Neither the lessee under the Indianapolis Gas Company lease nor any person claiming by, through or under it as the beneficiary of a trust therein, or otherwise, can attack the validity of such lease while continuing to hold and operate the lessor's property thereunder.

"8. The lapse of fifteen years since the execution of the lease by the Indianapolis Gas Company to the Citizens Gas Company is a bar to any action by a person claiming through or under the lease to set aside such lease or quiet title as against the claims of the lessor thereunder."



1176 PLAINTIFFS' STIPULATION EXHIBIT 40.

State of Indiana, }  
County of Marion. } ss:

IN THE MARION SUPERIOR COURT, ROOM 2.

Allen G. Williams, <i>et al.</i> ,	}	No. A-53965.
<i>Plaintiffs,</i>		
<i>vs.</i>		
Citizens Gas Company of Indian-		
apolis, a corporation, <i>et al.</i> ,	}	
<i>Defendants.</i>		

DEMURRER.

Comes now the defendants, John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin McIntosh, Jere West, as members of the Public Service Commission of Indiana and by way of demurrer to the complaint of the plaintiffs herein allege and say:

That the complaint does not state facts sufficient to constitute a cause of action against these defendants.

(signed) James M. Ogden,  
*Attorney General.*

(signed) G. W. Hufsmith,  
*Assistant Attorney General.*  
*Attorneys for Defendant,*  
*Public Service Commission.*

1177

MEMORANDUM.

I.

After alleging on page 3, paragraph 5 that the defendants, John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin McIntosh and Jere West, are made defendants herein in their capacity as members of the Public Service Commission of Indiana, the next allegation of said complaint touching upon these defendants just hereinbefore named is found on page 25 of said complaint, in the next to the last paragraph of subdivision 20, wherein it is alleged in substance that certain defendants herein not including any of the defendant members of said com-

mission designed to have created a Public Service Commission in the State of Indiana. And in the last paragraph of said subdivision 20, page 25 of said complaint, it is alleged in substance that said confederates began to act and did accomplish the creation of said commission.

### A.

There can be in law nothing which will constitute a conspiracy to bring about the enactment of a valid public statute. Any and all of the averments of the complaint alleging that certain persons, not members of the Public Service Commission, confederated to cause the creation of the Public Service Commission of Indiana, are without any weight in law and attempt to present an issue to this court which it has no right or jurisdiction to determine. There are no allegations or averments in said complaint that these defendants as members of the Public Service Commission of Indiana or their predecessors in office conspired to bring about the enactment creating the Public Service Commission.

1178

### B.

There is no allegation in said complaint that these defendants as present members of the Public Service Commission of Indiana or any of their predecessors in office since the creation of the commission in 1913, were participants in any conspiracy with a view of creating said commission.

## II.

Page 25 of said complaint, subdivision 22 alleges in substance that a petition was filed with said commission in May of 1913, praying for the approval of said commission to a certain lease executed by and between the Indianapolis Gas Company as Lessor and to said Citizens Gas Company as Lessee, and sets out in full a copy of said petition.

Subdivision 23, page 26 of said complaint in substance avers the approval of said commission with certain limitations of said petition and sets out in detail the provisions and terms of the lease as approved by said commission.

**A.**

The said order of the commission cannot be attached in a collateral proceeding, such as this action purports to do, except for fraud.

**B.**

That if the said order of the commission approving the lease was subject to a review by the courts, such review could only be had under the provisions of section 79 of the Shively-Spencer Act, (Burns' 1926, Section 12750).

1179

**C.**

There can be no review of a discretionary act of the Public Service Commission in a collateral attack except upon the grounds of fraud and there are no allegations that said commission acting fraudulently in the approval of said Lease or that any review was heard of said order of the commission under the provisions of said section 79, *supra*.

**III.**

Page 44 of said complaint, subdivision 6, it is alleged that in furtherance of said conspiracy, the Citizens Gas Company in August, 1921, filed its declaration of surrender of its franchise with the City of Indianapolis seeking to obtain an indeterminate permit under the provisions of the Shively-Spencer Act and on page 45, subdivision 27 of said complaint, it is averred that on December 12, 1921, said Public Service Commission entered its order approving the surrender of the franchise and the granting of an indeterminate permit. Such action of the commission is alleged to be unlawful and void as indicated in paragraphs' 1, 2, 9, 4 and 5 on pages 46, 47 and 48. Said complaint alleges that said order is unconstitutional in that it contravenes the provisions of article 1, section 24 of the Indiana Constitution by impairing the right of contract; that the act creating the Public Service Commission, known as the Shively-Spencer Act is unconstitutional and void, insofar as it attempts to confer authority upon the commission to grant an indeterminate permit and accept the surrender of a franchise; that the commission as a body could not enact legislation in

that its members did not reside in the City of Indianapolis and are not chosen under the provisions of law  
1180 designating the manner of choosing members of the Indiana legislature.

A.

The Legislature acted within its constitutional limitations in delegating that part of its police power to the Public Service Commission of Indiana in giving to said commission the right to approve the surrender of franchises theretofore existing and grant in lieu thereof an indeterminate permit.

B.

That said act of the Public Service Commission in granting the indeterminate permit alleged in the complaint acted within its jurisdiction.

C.

It is not alleged in said complaint that said commission in approving the said surrender of the franchise and the issuance of an indeterminate permit in lieu thereof acted fraudulently.

D.

That the allegations of said complaint testing the legality of said order of the commission constituting a collateral attack upon the order of the Public Service Commission and can not prevail unless it is alleged that said order was fraudulently entered by said commission.

E.

Said order of the commission does not impair the provisions of article 1, section 24 of the Indiana Constitution and does not abridge the right of contract;  
1181 that the Public Service Commission of Indiana has authority to accept the surrender of franchises and issue indeterminate permits in lieu thereof; that said Public Service Commission's members need not be chosen as legislators in Indiana are chosen but may be appointed as provided by law without contravening any provision of the state or federal constitution.

## IV.

Page 48, subdivision 28 of said petition alleges that the Public Service Commission in 1922 denied the petition of the Citizens Gas Company to establish a rate of \$1.25 per unit of 1,000 cubic feet, and that said commission was restrained by the United States District Court for the District of Indiana, from preventing the said Citizens Gas Company from collecting said rate of \$1.25 per thousand cubic feet on the ground that said order of the commission was confiscatory and in contravention of the 14th amendment of the constitution. Said order of the commission being passed upon and restrained by our Federal Court, estops these plaintiffs from presenting in the state court in this action any question involving the legality of said order, it having been fully adjudicated in the federal court.

## A.

State courts cannot review the same subject matter previously submitted to and decided by a federal tribunal.

## B.

That any and all allegations in said complaint 1182 attacking this order of the Public Service Commission constitute a collateral attack upon said order and do not allege that said order was fraudulently entered by said commission and therefore does not constitute a valid attack upon said order of the commission.

## V.

That any and all of the averments of said complaint directed to these defendants, as members of the Public Service Commission either attack the constitutionality of the creation of the commission by and through the Shively-Spencer Act or the orders of the commission, after its creation.

Said Shively-Spencer Act creating the Public Service Commission is constitutional and delegates to said commission such exercise of the police power as is not therein delegated to municipalities; that the commission had jurisdiction to enter and promulgate any and all orders

in said complaint attacked by the plaintiffs herein; that all of said orders in said complaint attacked are valid and lawful orders of said Public Service Commission; that said complaint herein is a collateral attack upon said orders of the commission and no allegations are contained in said complaint alleging that any of said orders complained of were fraudulently entered by said commission and therefore do not constitute in law a valid attack upon said orders of the commission in said complaint complained of.

That if said complaint in fact is not a collateral attack upon the orders of the commission said orders of the commission duly entered may only be reviewed under the provisions of section 78 of the Shively-Spencer Act as originally enacted or under the provisions of section 78 of the Shively-Spencer Act as amended in chapter 258, Acts of 1927, page 747, or under the provisions 1183 of an act of the 1929 legislature, pages 530 to 534, inclusive.

Said complaint does not show on its face or does not contain allegations of fact bringing said complaint within any of the provisions of the foregoing sections and that said complaint is not filed within the time designated in said provisions of the law for a review of an order of the commission and the plaintiffs herein are thereby estopped from reviewing the orders of the commission complained of in their petition.

(signed) James H. Ogden,  
*Attorney General.*

(signed) G. W. Hufsmith,  
*Assistant Attorney General.*  
*Attorneys for Defendant.*  
*Public Service Commission.*

#### 1184 PLAINTIFFS' STIPULATION EXHIBIT 47.

Resolution of Board of Directors for Utilities Re Offering  
of Gas Plant Revenue Bonds Adopted May 7, 1935.

"A Resolution (No. 2--1935) for the Issuance of Gas  
Plants Revenue Bonds. Adopted May 7, 1935.

"Resolved, by the Board of Directors for Utilities of  
the City of Indianapolis, Indiana:

"That for the purpose of obtaining funds for the taking over of certain property owned by Citizens Gas Com-

pany of Indianapolis and/or in which it has an interest, including moneys required to be paid for the redemption or extinguishment of its capital stock and/or for the payment of certain of its obligations and for the necessary expenses incurred in connection therewith, including the expenses of the City incident to obtaining such funds, as well as for the purpose of making certain betterments, improvements, extensions and additions to such property, the City of Indianapolis shall issue bonds which are to be paid solely and exclusively from the income and revenues of such utility property and not otherwise and shall not in any respect be an indebtedness of such City payable out of taxes.

"Such bonds shall be aggregate principal amount of Eight Million Dollars (\$8,000,000).

"They shall be issued in denominations of One Thousand Dollars (\$1,000) each.

"They shall be numbered consecutively, commencing with No. 1.

"They shall become due at such time or times, and in such manner with such accompanying pertinent provisions, as shall be specified by the terms of the accepted bid as hereinafter more specifically referred to; but there shall be as bonds maturing in less than two (2) nor more than forty (40) years from the date of issuance.

1185 "The interest rate upon said bonds shall be that fixed by the terms of the accepted bid therefor, as hereinafter mentioned; and each bond shall bear interest at said rate, (which shall not exceed five and one-half per cent per annum) evidenced by coupons attached to said bonds, payable semi-annually commencing six months after the date of said bond until said bond is due and payable.

"Both bonds and interest coupons shall be payable at the office of the Treasurer of Marion County, Indiana, or at the office of such official as shall have the duties of the Treasurer of the City of Indianapolis, and/or at such bank or trust company or office, whether in Indianapolis, and/or in Chicago, Illinois and/or New York City, or elsewhere as may be agreed upon between this Board and the successful bidder for said bonds, or in the absence of such an agreement, to be specified by this Board, and such bonds and interest coupons shall be payable in such funds as on the respective dates of payment are legal tender in the United States of America for such purpose.

"Said bonds shall be dated as of such date as may be



agreed upon between this Board and the successful bidder, not inconsistent with law.

"Said bonds shall be signed by the Mayor of said City and attested by its City Controller and by its City Clerk who shall affix the seal of the City thereto; and if any person whose signature appears on such bonds or coupons as Mayor or City Controller or City Clerk shall cease to be such officer before delivery of such bonds or any of them, such signature shall nevertheless be valid and sufficient for all purposes as if such officer had remained in office until such delivery.

1186 "Said bonds shall have the qualities of negotiable instruments in the hands of good faith holders.

"Said bonds shall be negotiable by delivery unless registered. Upon presentation of any such bonds to the City Controller of said City for registration, said City Controller shall cause such bond or bonds to be registered as to principal without charge or expense for registration, and such registration shall be noted on such bond or bonds and on the books of the City; after which no transfer thereof shall be valid unless made by the registered holder or his legal representative and similarly noted on the bond or bonds. But any such bond so registered as to principal may be discharged from such registration by appropriate notation on the books of the City at the request of the registered holder, after which such bond shall be transferable by delivery but may again be registered as to principal as before. The registration of any bond as to principal shall not affect the negotiability of the interest coupons attached thereto, but such coupons shall be transferable by delivery merely.

"Said bonds shall be exempt from taxation as to principal and income, as prescribed by the statutes of the State of Indiana.

"The form and tenor of said bonds and of the interest coupons to be attached thereto and of the registry indorsements thereon (exclusive of provisions fixing the date, the interest rate, provisions for maturity, and/or call, and/or sinking fund which are to be determined by the terms of the accepted bid and exclusive of provisions to be determined by the City or by agreement between the successful bidder and this Board, consistently with law) shall be substantially as follows, to-wit:



1187 "No. \_\_\_\_\_

\$ \_\_\_\_\_

City of Indianapolis Gas Plant Revenue Bond  
City of Indianapolis, Marion County,  
State of Indiana.

"The City of Indianapolis in the County of Marion and State of Indiana, for value received, hereby promises to pay to the bearer, or if this bond be registered, then to the registered holder, solely out of the revenue derived from the operation of its gas system, the principal amount of One Thousand Dollars on the \_\_\_\_\_ and to pay interest thereon from the date hereof until the principal is paid at the rate of \_\_\_\_ per cent, per annum, payable on the \_\_\_\_\_ day of \_\_\_\_\_, 193\_\_\_\_, and semi-annually thereafter on the \_\_\_\_\_ in each year, upon presentation and surrender of the annexed coupons as they severally become due. Both principal and interest of this bond are payable at \_\_\_\_\_ in \_\_\_\_\_ and \_\_\_\_\_ in \_\_\_\_\_ in such funds as are on the respective dates of payment of the principal of and interest on this bond, legal tender in the United States of America for such purposes.

"This bond is one of a total issue of \_\_\_\_\_ bonds of the City of Indianapolis of like date and tenor, except as to numbers and dates of maturity, in the total amount of \$8,000,000.00, issued for the purpose of providing funds for the purpose of taking over property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest, including moneys required to be paid for the redemption or extinguishment of its capital stock and or for the payment of certain of its obligations and for the necessary expenses incurred in connection therewith, including the expenses of the City incident to obtaining such funds, as well as for the purpose of making certain betterments, improvements, extensions and additions to such property; pursuant to a resolution adopted by the Board of Directors for Utilities of the City of Indianapolis, Indiana, on the 7th day of May, 1935, entitled: "A Resolution (No. 2-1935) for the Issuance of Gas Plant Revenue Bonds" and in compliance with all applicable provisions of law, including the provisions of Chapter 77 of the Acts of 1929, Chapter 27 of the Acts of 1931, and Chapter 125 of the Acts of 1933, as amended

by Chapter 311 of the Acts of 1935 of the General Assembly of the State of Indiana.

"The payment of the principal and interest of this and of all other bonds of this issue is secured by a charge upon all the revenue from the operation of all of the gas system owned and/or operated by the City of Indianapolis. This bond shall not in any respect be an indebtedness of the City of Indianapolis payable out of taxes. The City covenants to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law, including the requirement of Chapter 190 of the Acts of 1933 of the General Assembly of the State of Indiana, viz.: that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, interest upon bonds, provided a sinking fund for liquidation of bonds, maintenance costs, operating charges, adequate funds for working capital, repairs and upkeep.

"This bond and all other bonds of said issue shall have the qualities of negotiable instruments in the hands of good faith holders.

"This bond shall be exempt from taxation as to principal and income, as prescribed by the Statutes of the State of Indiana.

1189 "This bond may be registered as to principal in the name of the holder, but unless so registered it shall pass by delivery. The interest coupons annexed hereto shall at all times pass by delivery.

"It is hereby certified that all acts required by law to be done precedent to and in the execution, issuance and delivery of this bond have been done in regular and due form as provided by law.

"In Witness Whereof the City of Indianapolis, in Marion County, Indiana, has caused this bond to be signed in its corporate name by its Mayor and attested by its City Controller and City Clerk and the Corporate seal of the City affixed as of the \_\_\_\_ day of \_\_\_\_\_, 193.....

City of Indianapolis, Indiana,

By \_\_\_\_\_  
*Its Mayor.*

Attest:

.....  
*Its City Controller.*

(Seal)

.....  
*Its City Clerk.*

1190

“(Interest Coupon)

Coupon No. \_\_\_\_\_ \$ \_\_\_\_\_

“On \_\_\_\_\_, 193\_\_\_\_, the City of Indianapolis, Marion County, Indiana, will pay to bearer at \_\_\_\_\_ or at \_\_\_\_\_ out of its Gas Plant Revenue funds, in such funds as are legal tender in the United States of America, for such purpose; being six (6) months interest on the Bond to which this coupon is annexed; Bond No. \_\_\_\_\_.

City of Indianapolis, Indiana,

By \_\_\_\_\_ *Its Mayor.*

Attest:

\_\_\_\_\_  
*Its City Controller.*

(Registration Indorsement)

“Upon presentation of this bond at the office of the City Controller of the City of Indianapolis, Indiana, for registration, this bond shall be registered as to principal without charge or expense to the holder; after which no transfer shall be valid unless made by the registered holder or by his legal representative; but this bond may be discharged from registration by appropriate notation on the books of the City at request of the registered holder, after which this bond may be transferred by delivery and may again be registerable. Registration of this bond shall not affect the negotiability of the 1191 interest coupons attached hereto and such coupons shall remain payable to bearer.

In Whose

Date of Registry:      Name Registered:      City Controller:

•      •      •      •      •      •  
“(Here follow detailed provisions in accordance with the applicable Indiana statutes as to advertising for, making, and acceptance of bids for the City's Gas Plant Revenue Bonds)”.  
(Inserted pursuant to stipulation filed November 22, 1939.)

1199 "The City agrees to take all necessary or desirable steps promptly to acquire the said property of the Citizens Gas Company of Indianapolis, and also agrees that when it has obtained the possession of the property operated by Citizens Gas Company of Indianapolis, it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost, and maintained in good operating condition; and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County, Indiana, and the towns therein.

"The City agrees that it will cause to be deposited with a national bank in Indianapolis, Indiana (reserving the right to transfer such account or any part thereof to any other one or more responsible banks or trust companies) in a special account, under such conditions as that moneys cannot be withdrawn from such account or accounts except for the payment of interest on and principal of said bonds in connection with agreed provisions for maturities and/or retirements, on the 15th day of each month during the operation of said gas system by the City, out of the revenues derived from the operation of said gas system, a sum equal to one-sixth of the amount due and payable for principal, if any, if principal payments are due semi-annually, or a sum equal to one-twelfth of the amount due and payable for principal, if any, if principal payments are due annually, plus a sum equal to one-sixth of the amount due and payable for interest, on the next succeeding interest paying date of said bonds.

"The City shall keep appropriate books of account and record, which shall correctly reflect the operations  
1200 of and revenues from said gas system, and all disbursements made therefrom, and all transactions relating thereto. Upon request of the original purchaser of said bonds there shall be furnished it, so long as it holds any of said bonds, and, upon written request, to any holder of any of said bonds quarterly or annual statements showing in reasonable detail the operations, income and expenditures of and in connection with such gas system. The City Controller shall keep in file copies of all such statements which holders of such bonds shall have the right at any reasonable time to inspect.

"So long as any of said bonds are outstanding and unpaid, the City shall maintain insurance on the insurable

parts of said gas system of a kind and in an amount as would normally be carried by privately owned companies engaged in a similar and comparable business; which insurance shall be placed and maintained in responsible companies qualified to do business under the laws of the State of Indiana; and the proceeds of such insurance shall be used in replacing, repairing, or rehabilitating the property destroyed or damaged or in extensions, additions and/or betterments; and if not so used, shall be used in the purchase and retirement of outstanding bonds.

"So long as any of said bonds are outstanding and unpaid the City shall not sell, mortgage or dispose of said gas system or any substantial and useful part thereof; provided, however, that the City shall have the right to mortgage said gas system or any substantial and useful part thereof for the purpose of refunding said bonds and the City shall have the right to sell or dispose of said gas system or any substantial and useful part thereof if the proceeds of such sale or disposition 1201 are sufficient for and are used for the payment in full of the principal and interest of the then outstanding and unpaid bonds and the City shall have the right to sell or dispose of any part of said system if the proceeds thereof are used for betterments, extensions or additions to said gas system in such manner as that the efficiency of said gas system is not thereby impaired.

"The right to lease such utility property and gas system, on terms and in manner consistent with law and which do not adversely affect the rights and interests of the holders of such bonds, is expressly reserved to the City; and the City agrees to give notice by one publication in one newspaper, printed in the English language, of general circulation in the City of Indianapolis, Indiana; in the City of Chicago, Illinois; and in the City of New York, New York, at least four (4) weeks prior to the execution of any lease, of its intention to execute any such lease.

"So long as any of said bonds are outstanding and unpaid, the City shall not issue additional bonds or other obligations payable out of the revenues of said gas system except for refunding said outstanding bonds, or for the acquisition of revenue producing property, betterments, extensions, and/or additions.

"So long as said gas system is not liable for taxes for City purposes, there shall be paid to the Treasurer of Marion County for the benefit of the City of Indian-

apolis, out of revenues derived from the operation of said system, to be distributed as taxes are distributed, a sum equal to the taxes which would be assessed for City purposes upon said gas system were said gas system privately owned; such payments to be made at such times during each calendar year as this Board may 1202 in its discretion determine but not to the prejudice of the payments hereinbefore provided.

"The City shall pay at prevailing rates for any gas obtained by it from the operation of said gas system.

"The provisions of this resolution shall constitute a contract by and between the City of Indianapolis, Indiana, and the holders of the bonds herein authorized; and after the issuance and delivery of such bonds this resolution shall not be revoked or amended in any respect which will adversely affect the rights and interests of the holders of said bonds." (Pages 67-85, inclusive, of the Minute Book, Volume I.)

#### 1203 PLAINTIFFS' STIPULATION EXHIBIT 48.

Resolution of Board of Directors for Utilities of the City of Indianapolis.

Adopted August 9, 1935.

"Resolution with Respect to Payment of Citizens Gas Mortgage Bonds.

"Resolved, by the Board of Directors for Utilities of the City of Indianapolis:

"That as a step in the acquisition of the property of Citizens Gas Company of Indianapolis by the City of Indianapolis pursuant to provisions contained in the Articles of Incorporation of said company, that the first and refunding mortgage bonds of Citizens Gas Company dated July 1st, 1912, shall be paid on or after August 12, 1935, at the office of the Controller of the City of Indianapolis, in the City Hall, Indianapolis, Indiana; said bonds to be paid at par plus accrued interest to September 15, 1935.

"Said bonds shall be presented for payment at the office of the Controller of the City of Indianapolis in the City Hall, Indianapolis, Indiana, with the January 1st, 1936, and subsequent coupons attached. The July 1st, 1935, interest coupon will be paid if detached and presented for payment in the usual manner.



"Interest on said bonds will cease from and after said 15th day of September, 1935, and all coupons for interest maturing subsequent to said date shall be void. That to provide the funds to pay said first and refunding mortgage bonds the sum of \$                      shall be segregated

from the proceeds of the sale of the City of Indianapolis

Gas Plant Revenue bonds of the issue dated June 1st, 1204 1935, and set up a trust fund therefor; that for this purpose Henry L. Dithmer and Brodehurst Elsey are authorized and directed as President and Treasurer, respectively, of this Board to take all steps necessary to make such segregation and create such fund and they are specifically authorized and directed on behalf of this Board either to issue an appropriate voucher or vouchers to Walter C. Boetcher as City Controller of the City of Indianapolis for said entire sum or to issue from time to time checks on such fund to the persons surrendering said bonds for payment. Said fund to be used for no other purpose except the payment of the principal and interest of said bonds.

"A certified copy of this resolution shall be sufficient evidence of their authority to cause such check or checks to be issued.

"And Be It Further Resolved that said officers are further authorized and directed to cause to be issued an appropriate notice to the holders of said first and refunding mortgage bonds dated July 1st, 1912, of the fact that payment therefor will be made and to cause publication to be made thereof in the Indianapolis Star, the Indianapolis Times and the Indianapolis News, and such other paper or papers in New York and/or Chicago as they may select, said notice to be in substantially the following form:

1205         \*                         \*                         \*                         \*                         \*

"(Here follows a form of 'Notice of Payment of Citizens Gas Company Mortgage Bonds', which form of Notice is identical with the Notice set forth as Plaintiffs' Stipulation Exhibit 49)".

(Inserted pursuant to stipulation filed November 22, 1939.)

(Pages 163-165 of the Minute Book)

**1206 PLAINTIFFS' STIPULATION EXHIBIT 49.**

**"Notice of Payment of Citizens Gas Company Mortgage Bonds.**

**"To the Holders of First and Refunding Mortgage Sinking Fund Gold Bonds of Citizens Gas Company of Indianapolis:**

"Notice is hereby given that as a step in the acquisition of the property of Citizens Gas Company of Indianapolis by the City of Indianapolis pursuant to provisions contained in the articles of incorporation of said Company, funds are now available for payment of the principal and unpaid accrued interest on the bonds outstanding in the hands of the public issued by said Company under the First and Refunding Mortgage dated July 1, 1912, and holders of said bonds are hereby notified to surrender the same for payment on or after August 12th, 1935, at the office of the Controller of the City of Indianapolis in the City Hall, Indianapolis, Indiana, with the January 1, 1936, and subsequent coupons attached. The July 1, 1935, interest coupon will be paid if detached and presented for payment in the usual manner.

"Said bonds will be paid at par, plus accrued interest to September 15, 1935.

"Interest on said bonds will cease from and after said September 15, 1935, and coupons for interest maturing subsequent to said date shall be void.

**"Department of Utilities of the  
City of Indianapolis,**

**By Henry L. Dithmer,  
President of Its Board of Directors."**

**"Dated at Indianapolis, Indiana,  
August 10th, 1935."**

**1207 PLAINTIFFS' STIPULATION EXHIBIT 50.**

**"Notice of Payment of Citizens Gas Company  
Mortgage Bonds.**

**"To the Holders of First and Refunding Mortgage Sinking Fund Gold Bonds of Citizens Gas Company of Indianapolis:**

"Notice is hereby given that on September 9, 1935, the City of Indianapolis acquired the property of Citizens Gas



Company of Indianapolis; and that the City recognizes the payment of the principal of the bonds issued by said Company under its First and Refunding Mortgage dated July 1, 1912, as having been accelerated as an incident of such acquisition by the City, and that such bonds are now due and payable at par, with accrued interest. The City of Indianapolis will accordingly pay such bonds at par, with interest to September 15, 1935, upon presentation of such bonds at the office of the Controller of the City of Indianapolis, Indiana, with the coupons for January 1, 1936, and subsequent dates, attached.

"The City will not pay interest on such bonds after September 15, 1935.

"This is not a call of such bonds, and no premium will be paid thereon.

"Department of Utilities of the City of  
Indianapolis, Indiana,  
By Henry L. Dithmer,  
*President of its Board of  
Directors.*"

"Dated at Indianapolis, Indiana,  
September 9, 1935."

## 1208 PLAINTIFFS' STIPULATION EXHIBIT 55.

"Deed of Conveyance of Real Estate.

"This Indenture Witnesseth,

. . . . .

"(Here follow 4 paragraphs which are identical with the first 4 paragraphs of the Assignment of Lease attached to the bill of complaint as Exhibit F (I R. 127-9))".

(Inserted pursuant to stipulation filed November 22, 1939.)

1209 "Now, Therefore, in consideration of the premises and for the purpose of carrying out and executing the public charitable trust as aforesaid, the Citizens Gas Company of Indianapolis, a corporation organized and existing under the laws of the State of Indiana, hereby conveys and releases to the City of Indianapolis, a municipal corporation organized and existing under the laws of the State of Indiana, all the said Company's right, title and interest in and to the following described real estate situated in the County of Marion, State of Indiana, to-wit:

• • • • •  
“(Here follows a detailed description by metes and bounds of the Citizens Gas Company property)”.

(Inserted pursuant to stipulation filed November 22, 1939.)

1212 “To Have and to Hold the said described real estate, with all the rights, easements, and appurtenances thereto belonging, to the said City of Indianapolis, to its use forever.

“This conveyance is made pursuant and subject to, and in conformity with the terms, conditions, and agreements contained in the original and amended articles of incorporation of Citizens Gas Company of Indianapolis, the franchise agreement entered into between said Company's assignors and the City of Indianapolis, under date of August 25th, 1905, as aforesaid, and Chapter 78 of the Acts of 1929 of the General Assembly of the State of Indiana.

“This conveyance is made subject also to the mortgage executed by Citizens Gas Company of Indianapolis, to Bankers Trust Company of New York, Primary Trustee, and The Union Trust Company of Indianapolis, Ancillary Trustee, under date of July 1, 1912, and recorded in Mortgage Record 593, page 399, in the office of the Recorder of Marion County, Indiana, securing an authorized issue of bonds in the principal amount of \$10,000,000, and to all other existing liens, incumbrances and assessments of any nature whatsoever.

“This conveyance is made subject also to all other legal obligations of the Citizens Gas Company of Indianapolis.

“In Witness Whereof, the said Citizens Gas Company of Indianapolis has caused this instrument to be executed by its Vice-President and the due execution thereof to be attested by its Secretary and by its corporate seal hereto affixed, this 9th day of September, 1935.

“Citizens Gas Company of Indianapolis,

By Franklin Vonnegut (sgd.),

*Vice-President.*

(Seal)

Attest:

F. G. Rastenburg (sgd.),  
*Secretary.”*

• • • • •  
1213

“(Acknowledgment omitted in printing)”.

(Inserted pursuant to stipulation filed November 22, 1939.)

1214 PLAINTIFFS' STIPULATION EXHIBIT 56.

"Assignment of Lease.

• • • • •  
“(Here follow 4 paragraphs which are identical with the first 4 paragraphs of the Assignment of Lease attached to the bill of complaint as Exhibit F (I R. 127-9))”.

(Inserted pursuant to stipulation filed November 22, 1939.)

1215 “Now, Therefore, in consideration of the premises  
and for the purpose of carrying out and executing the  
public charitable trust as aforesaid, the Citizens Gas Com-  
pany of Indianapolis, a corporation organized and exist-  
ing under the laws of the State of Indiana, hereby assigns  
and conveys unto the City of Indianapolis, a municipal cor-  
poration organized and existing under the laws of the  
State of Indiana, all the said Company's right, title and  
interest in and to the certain lease bearing date the 18th  
day of July, 1933, made by John J. Reilly, Receiver of Ma-  
jestic Building Company, to Citizens Gas Company of In-  
dianapolis, a corporation organized and existing under the  
laws of the State of Indiana, to have and to hold the  
1216 same unto the said City of Indianapolis from the date  
of this instrument, for and during the residue of the  
term mentioned in said lease, subject nevertheless to the  
rents, covenants, conditions and provisions therein men-  
tioned.

“1. This transfer and assignment is made pursuant and  
subject to, and in conformity with, the terms, conditions  
and agreements contained in the original and amended ar-  
ticles of incorporation of Citizens Gas Company of Indian-  
apolis, the franchise agreement entered into between said  
Company's assignors and the City of Indianapolis, under  
date of August 25th, 1905, as aforesaid, and Chapter 78 of  
the Acts of 1929 of the General Assembly of the State of  
Indiana.

“2. This transfer and assignment is made subject also  
to the mortgage executed by Citizens Gas Company of In-  
dianapolis, to Bankers Trust Company of New York, Pri-  
mary Trustee, and The Union Trust Company of Indianap-  
olis, Ancillary Trustee, under date of July 1, 1912, and re-  
corded in Mortgage Record 593, page 399, in the office of  
the Recorder of Marion County, Indiana, in the principal  
amount of \$10,000,000, and to all other existing liens, in-  
cumbrances and assessments of any nature whatsoever.

"3. This assignment is also made subject to all other legal obligations of said Citizens Gas Company of Indianapolis.

"In Witness Whereof, the said Citizens Gas Company of Indianapolis has caused this instrument to be executed by its Vice-President and the due execution thereof to be attached by its Secretary and by its corporate seal hereto affixed, this 9th day of September, 1935.

"Citizens Gas Company of Indianapolis,  
By Franklin Vonnegut,  
*Vice-President.*

Attest:

F. G. Rastenburg,  
*Secretary.*"

1217     •     •     •     •     •     •

"(Acknowledgment omitted in printing)".

(Inserted pursuant to stipulation filed November 22, 1939.)

#### 1218 PLAINTIFFS' STIPULATION EXHIBIT 58.

July 23, 1935.

Indianapolis Gas Company,  
Indianapolis.

Gentlemen:

The Department of Utilities of the City of Indianapolis will, early in September, take over the property which has been operated by Citizens Gas Company of Indianapolis.

On September 30, 1913, Citizens Gas Company and Indianapolis Gas Company entered into a lease which was approved by the Public Service Commission of Indiana, by which Indianapolis Gas Company leased its gas system to Citizens Gas Company for a term of ninety-nine years.

Under the authority of an Act of the Indiana General Assembly approved March 11, 1929, the City, in acquiring the property of Citizens Gas Company, does not become liable for the obligations of that Company.

Various provisions of this lease appear to be inappropriate and burdensome to the City when it assumes operation of the gas system. The City, through its Department of Utilities, is willing to enter into negotiations with you looking toward a revision of this lease to meet the new conditions that will result from municipal operation, if you so desire.

Very truly yours,  
Thompson Rabb & Stevenson.

1219 PLAINTIFFS' STIPULATION EXHIBIT 59.

August 31, 1935.

Mr Arthur V. Brown,  
Indianapolis.

Mr. Louis E. Ewbank,  
Indianapolis.

Gentlemen,—

With further reference to the recent conversation which representatives of the City had with you as officers or directors of The Indianapolis Gas Company:

The specific question which the City desires answered before September 9, 1935, by The Indianapolis Gas Company, is this:

Will The Indianapolis Gas Company, permit the City of Indianapolis to use its property at present under lease to Citizens Gas Company of Indianapolis, for a period of six months next following the take-over of the property of Citizens Gas Company by the City of Indianapolis (at present scheduled for September 9, 1935), in order to prevent interruption of service to gas consumers; the City to make, during such period, the payments to and on behalf of The Indianapolis Gas Company contemplated by said lease; but the City not to presently assume said lease, or accept an assignment of it, nor to be considered as so doing by such user; and the City and The Indianapolis Gas Company meantime to endeavor in good faith to agree upon terms for the adoption or modification of such lease or for continued user of such property.

Will you please let us have an answer on behalf of The Indianapolis Gas Company prior to September 9, 1935?

Very truly yours,

Thompson Rabb & Stevenson.

Copy to:

Mr. Henry L. Dithmer,  
President, Board of  
Directors for Utilities,  
City of Indianapolis.

## 1220 PLAINTIFFS' STIPULATION EXHIBIT 66.

1004 Majestic Building,  
Indianapolis, Indiana,  
September 30, 1935.

Thompson, Kabb & Stevenson,  
115 North Pennsylvania Street,  
Indianapolis, Indiana.

Gentlemen:

Your letters of July 23, August 31, and September 16, 1935, have been brought to the attention of the Board of Directors of The Indianapolis Gas Company. An earlier meeting of the Board was prevented by the absence of many of its members.

In acknowledging these letters, I am directed by the Board of Directors to say that the Board assumes the validity of the lease entered into by it with the Citizens Gas Company of Indianapolis on September 10, 1913, which was approved by the Public Service Commission of Indiana, and that all of its provisions continue to have binding force.

If the Department of Public Utilities of the City of Indianapolis desires to discuss with The Indianapolis Gas Company any of the provisions of that lease, or any questions relating thereto, The Indianapolis Gas Company will, of course, be glad to take part in such a discussion at a time and place mutually agreeable to the representatives of the Company and the Department of Utilities.

Pending the determination of the questions which you may desire to consider, The Indianapolis Gas Company, not desiring to disrupt or inconvenience the public service, will be glad to enter into a mutual stipulation with you, if you so desire, that compliance with the terms of the lease shall be without prejudice to the legal rights and claims either of the Department of Utilities or of The Indianapolis Gas Company.

Very truly yours,

The Indianapolis Gas Company

By Way Yule

*Secretary.*

1222 PLAINTIFFS' STIPULATION EXHIBIT 67.

September 30, 1935.

The Indianapolis Gas Company,  
1004 Majestic Bldg.,  
Indianapolis.

Gentlemen:

As we have heretofore advised you, we are willing to undertake to negotiate the terms of a new lease from you to the City of Indianapolis which will be both appropriate and fair, and would be pleased to have you indicate an early date for a conference.

Very truly yours,

Board of Directors for Utilities  
of the City of Indianapolis.

By Thompson Rabb & Stevenson

*Its Counsel.*

1223 PLAINTIFFS' STIPULATION EXHIBIT 75.

1004 Majestic Building,  
Indianapolis, Indiana,  
February 8, 1936.

Board of Directors for Utilities of the  
City of Indianapolis.

Attention: Thompson, Rabb & Stevenson, Counsel.

Gentlemen:

In view of the near approach of March 9th, at which time our tentative arrangement will expire, and in order to reach if possible some basis of negotiation looking toward an adjustment of the differences between us in relation to the property of The Indianapolis Gas Company which you are operating, but without waiving any rights, legal or equitable, which The Indianapolis Gas Company has in or to any property or contracts relating thereto, permit us to request that without any waiver of rights on your part or any surrender of property or rights by either party pending the making of an agreement between us, you submit to The Indianapolis Gas Company for consideration by its directors, stockholders and creditors, a proposition embracing the prices, terms and conditions upon and pursu-



ant to which you are willing to take over the property and franchises of The Indianapolis Gas Company.

Very truly yours,

The Indianapolis Gas Company

By Way Yule

Secretary.

## 1224 PLAINTIFFS' STIPULATION EXHIBIT 76.

The Indianapolis Gas Company,  
Indianapolis.

Gentlemen:

In accordance with your request we submit herewith for your consideration a proposal to purchase the entire plant and property of your Company used or useful in manufacturing or furnishing gas or by-products in the City of Indianapolis on the following terms and conditions:

1. We will pay you the sum of \$7,500,000 for such property, which will be paid out of the proceeds of the sale of revenue bonds.

2. We will pay you interest on said sum of \$7,500,000 at the rate of 3 per cent per annum, from and after March 9, 1936, to the time when the bonds hereinafter referred to have been sold and the proceeds of such bond issue paid to the City of Indianapolis.

3. You are to transfer or cause to be transferred to the City of Indianapolis upon tender of the price therefor a good legal title to said property (free and clear of all liens and encumbrances other than taxes as hereinafter specified) subject to the approval of our attorneys, and, at your own expense, to bring and maintain any and all proceedings which may be necessary to accomplish that result.

4. If title to the property referred to is not conveyed to the City of Indianapolis on or before November 1st, 1936, the City shall have the right at its option to decline to proceed with the transaction.

1225 5. It will be necessary for the City of Indianapolis, in order to obtain a major portion of the consideration hereby agreed to be paid to you, to issue and sell revenue bonds. You therefore are to agree:

(a) When the City of Indianapolis offers revenue bonds for sale in the aggregate par value of not less than \$7,000,000 or more than \$7,500,000 you will cause to be made a firm bid for such revenue bonds at par plus the interest

accrued thereon (from the date of the coupon first maturing to the date of the delivery of such bonds to you).

(b) The bonds are to run for a period of thirty years from the date of issuance thereof bearing interest at the rate of three per cent payable semi-annually and in addition to the interest charge thereon the City is to agree to pay annually an additional sum which will be sufficient over the period of the bond issue to retire and redeem one-fourth of the total amount thereof; these redemptions may be by the creation of a sinking fund and retirements by call or serially upon the principal at your option. In all other respects not herein specifically stated the bonds are to be of like tenor and effect to the \$8,000,000 par value of revenue bonds heretofore sold by the City of Indianapolis.

(c) The City of Indianapolis will pay the ordinary and usual expenses incident to such bond issue, such as advertising, cost of printing and delivery of the bonds; and will furnish the opinion of its counsel that the bonds are in accordance with their terms valid obligations to be paid out of gas revenues of the City; but the City will not pay and shall not be obligated to assume any discount on the bonds or the cost of any opinion from the attorneys 1226 for the purchaser.

6. By mutual agreement the lease executed by The Indianapolis Gas Company to the Citizens Gas Company under date of September 30, 1913, is to be cancelled and terminated on and as of March 9, 1936, and neither party thereto is to have any claim, right or cause of action against the other under or by virtue of said lease or for any claimed violations of the terms thereof or otherwise and each party shall execute a complete release to the other; and the City may use the property covered by such lease without any obligation to The Indianapolis Gas Company other than the payment specified in Paragraph 2 hereof.

7. The City of Indianapolis shall in no event be obligated to pay any taxes (other than the property taxes on the real estate and personal property belonging to The Indianapolis Gas Company, all of which will be assumed if this transaction is consummated), or any attorneys' fees or other expenses or costs as provided either in The Indianapolis Gas Company mortgage or said lease of September, 1913.

8. You are to assign to the City at the time of the transfer of the property all your franchises, grants, indeterminate permits and licenses that pertain to such property or to the manufacture or distribution of gas.

9. This proposition is conditioned upon the approval of any public official or officials whose approval may be legally necessary.

In the making of this proposal and the conducting of any negotiations which may ensue subsequent thereto  
1227 neither you nor are we to be prejudiced in any way  
nor is either of us to waive any right which either of us may lawfully assert.

Dated at Indianapolis, Indiana, February 10, 1936.

The Board of Directors for Utilities  
of the Department of Utilities of  
the City of Indianapolis,

By Henry L. Dithmer,  
*President of its Board of  
Directors.*

## 1228 PLAINTIFFS' STIPULATION EXHIBIT 86.

Resolution of Board of Directors of Citizens Gas Company  
Adopted September 9, 1935.

"Mr. Insley moved the adoption of the following resolution:

"Whereas, the City of Indianapolis, in the exercise of its right to take over and administer the property of Citizens Gas Company, of Indianapolis as a public charitable trust, has deposited with The Indiana National Bank of Indianapolis, in a special account to the credit of the Citizens Gas Company of Indianapolis, the sums of \$2,500,000 and \$1,050,000 to be held by the said Company as trust funds to be used for the sole purpose of retiring, respectively, the outstanding common stock of said Company at the par value thereof plus dividends at the rate of 10% per annum and retiring the outstanding preferred stock of said Company at 105% of the par value thereof, said Company, by its Board of Directors has furnished and made provision for the funds necessary for the payment of the dividend upon such preferred stock for the current quarter expiring August 31st, 1935); and,

"Whereas, by the provisions of the original and amended articles of incorporation of said Company, the franchise agreement entered into on August 25th, 1905, between the said City and the assignors of said Company, and the judgment and decision of the United States District Court for the Southern District of Indiana adjudicating the validity of said public charitable trust, the right of the City of

Indianapolis to acquire, take over and administer such property became complete upon the providing of the funds as aforesaid, and nothing further remains to be done to entitle said City to have such property conveyed and transferred to it.

"Now, Therefore, Be It Resolved that the proper corporate officers of the Citizens Gas Company of Indianapolis be, and they hereby are, authorized to execute and deliver deeds of conveyance and instruments of transfer and assignment in the words and figures as follows, to wit:"

(Here the "Deed of Conveyance of Real Estate" and the "Instrument of Transfer and assignment of Personal Property," subsequently executed by Citizens Gas Company, were copied in full. A correct copy of said "Deed of Conveyance of Real Estate" is attached to this Stipulation as Exhibit 55 hereto. A correct copy of said "Instrument of Transfer and Assignment of Personal Property," with the exception of the "List of Executory Contracts to which Citizens Gas Company of Indianapolis is a Party" which appears at the very end of said Instrument and which is set forth immediately below, is attached to the Bill of Complaint in cause 1844 as Exhibit E and in cause 1950 as Exhibit F.)

1229 "List of Executory Contracts to Which Citizens Gas Company of Indianapolis is a Party.

Name	Address
Central United Coal Company—Chicago, Illinois	
The Koopers Coal Company—Pittsburgh, Pa.	
Lake & Export Coal Corporation of New York—New York City	
Milburn By-Products Coal Company (Subsidiary)—Milburn, W. Va.	
The West Virginia Coal & Coke Corporation—Cincinnati, Ohio	
Indianapolis Power & Light Company—Indianapolis, Indiana	
Dearborn Chemical Company—Indianapolis, Indiana	
The Hegeler Zinc Company—Danville, Illinois	
Wm. Lynn Chemical Company—Indianapolis, Indiana	
Michigan Alkali Company—New York City	
Shell Petroleum Corporation—St. Louis, Mo.	
Standard Oil Company—Indianapolis, Indiana	
J. D. Adams Company—Indianapolis, Indiana	

Name	Address
Buffalo Belt Company—	North Tonawanda, N. Y.
General Electric Company—	New York City
Indiana Oxygen Company—	Indianapolis, Indiana
The Linde Air Products Company—	Indianapolis, Indiana
The Republic Creosoting Company—	Indianapolis, Indiana
Indianapolis Union Railway Company	
Belt Railroad Division—	Indianapolis, Indiana
The Indianapolis News—	Indianapolis, Indiana
The Indianapolis Star—	Indianapolis, Indiana
The Indianapolis Times—	Indianapolis, Indiana
The Western Union Telegraph Company—	Indianapolis, Indiana
Domhoff & Joyce Company—	Cincinnati, Ohio
The Barrett Company of	New Jersey
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company	
Kroger Grocery & Baking Company	
City of Indianapolis	
R. T. Fatout to Merion Corporation"	

(Here the two Assignments of Lease subsequently executed by Citizens Gas Company were copied in full. A correct copy of the first "Assignment of Lease" incorporated in said resolution is attached to this Stipulation as Exhibit 56 hereto. A correct copy of the second "Assignment of Lease" incorporated in said resolution is attached to the Bill of Complaint in cause 1844 as Exhibit F and in cause 1950 as Exhibit G.)

"Further Resolved that, prior to making delivery of the foregoing instruments to the said City of Indianapolis, the said officers shall take and receive from the said City an indemnity agreement in the words and figures as follows, to wit:"

1230 (Here the "Indemnity Agreement" subsequently executed by the Board of Directors for Utilities of the City of Indianapolis was copied in full. A correct copy of said "Indemnity Agreement", marked "Exhibit J", is attached to the Second Amendment and Supplement to the Bill of Complaint in cause 1844 and to the Amendment and Supplement to the Bill of Complaint in cause 1950.)

"Which motion, being seconded by Mr. Evans, was put upon its passage and carried."

(Pages 80-90, inclusive, of the Minute Book.)

1231 PLAINTIFFS' STIPULATION EXHIBIT 87.

Resolution of Board of Trustees of Citizens Gas Company  
Adopted September 9, 1935.

"Mr. Lieber moved the adoption of the following resolution:

"Trustees' Resolution as to Conveyance and Transfer of  
Property to City of Indianapolis.

. . . . .

"(Here appear 2 paragraphs which are identical with the first 2 paragraphs of Plaintiffs' Stipulation Exhibit 86)".  
(Inserted pursuant to stipulation filed November 22, 1939.)

"Whereas, the Board of Directors of Citizens Gas Company of Indianapolis, at a meeting thereof duly held on the 9th day of September, 1935, by proper resolution authorized the conveyance, transfer, and assignment of all the property of the Citizens Gas Company of Indianapolis to the City of Indianapolis in the execution and the carrying out of the public charitable trust as aforesaid, and directed the officers of said Company to make and execute, for and on behalf of said Company the deeds of conveyance, and instruments of transfer and assignment, in the form hereinafter set out.

"Now, Therefore, Be It Resolved that insofar as this Board of Trustees has authority so to do, the proper corporate officers of the Citizens Gas Company of Indianapolis be, and they hereby are, authorized to execute and deliver deeds of conveyance and instruments of transfer and assignment in the words and figures as follows, to wit:

(Here the resolution sets forth the same instruments as those set forth in Exhibit 86 to this Stipulation in the very same language in which those instruments are there set forth. Said instruments are: "Deed of Conveyance of Real Estate," "Instrument of Transfer and Assignment of Personal Property," "Assignment of Lease," and second "Assignment of Lease.")

"Further Resolved that, prior to making delivery of the foregoing instruments to the said City of Indianapolis, the said officers shall take and receive from the said City an indemnity agreement in the words and figures as follows, to wit:'



(Here the "Indemnity Agreement" subsequently executed by the Board of Directors for Utilities of the City of Indianapolis was copied in full. A correct copy of said "Indemnity Agreement", marked "Exhibit J", is attached to the Second Amendment and Supplement to the Bill of Complaint in cause 184+ and to the Amendment and Supplement to the Bill of Complaint in cause 1950.)

"which motion, being seconded by Mr. Schnull, was put upon its passage and carried."

(Pages 93-103, inclusive, of the Minute Book.)

1233

## PLAINTIFFS' EXHIBIT 88.

## Certificate.

I, Harold C. Mull, hereby certify that I am Secretary of the Public Service Commission of Indiana and have custody of the records of said Commission, and that after diligent search I am unable to find among such records any of the following papers:

1. Petition of Citizens Gas Company of Indianapolis and Indianapolis Gas Company dated in 1913 asking an order authorizing Indianapolis Gas Company to lease its property to the Citizens Gas Company, which petition was acted upon as shown by an entry in Public Service Commission Order Book No. 1, at page 154.

2. Intervening petition by way of remonstrance filed by Frank S. Fishback opposing the aforesaid petition.

3. Petition for rehearing or motion for new trial filed by Frank S. Fishback, which motion was overruled by an entry appearing in Public Service Commission Order Book No. 1, at page 273.

Signed and sealed at Indianapolis, Indiana, this 27 day of February, 1939.

(Seal)

Harold C. Mull,  
*Secretary of Public Service  
Commission of Indiana.*

1234

"(Certificate to qualifications of certifying Officer omitted in printing)".

(Inserted pursuant to stipulation filed November 22, 1939.)



PLAINTIFFS' EXHIBIT 89.

\* \* (Caption) \* \*

SEPARATE AND SEVERAL ANSWER OF DEFENDANTS CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION; L. ERT SLACK, AS MAYOR OF THE CITY OF INDIANAPOLIS; WILLIAM A. BOYCE, JR., AS CITY CLERK OF THE CITY OF INDIANAPOLIS; THEODORE H. DAMMEYER, JOHN C. McCLOSKEY AND EMSLEY W. JOHNSON, AS THE BOARD OF PUBLIC WORKS OF THE CITY OF INDIANAPOLIS, TO PLAINTIFFS' BILL OF COMPLAINT.

Filed June 4, 1929 Albert C. Sogemeier.

John W. Holtzman,  
Oren S. Hack,  
Edward H. Knight,  
Smiley N. Chambers,  
Pickens, Davidson, Gause, Gil-  
liom & Pickens,

*Attorneys for Said Answer-  
ing Defendants.*

John W. Holtzman,  
Fred C. Gause.

*Of Counsel.*

\* \* (Caption) \* \*

The City of Indianapolis, a municipal corporation; L. Ert Slack, as Mayor of the City of Indianapolis; William A. Boyce, Jr., as City Clerk of the City of Indianapolis; Theodore H. Dammeyer, John C. McCloskey, and Emsley W. Johnson, as the Board of Public Works of the City of Indianapolis, defendants in the above-entitled cause, for answer to plaintiffs' bill of complaint, say:

1. These answering defendants admit all the averments contained in the first subdivision of the plaintiffs' bill of complaint, except that they deny the averment that the plaintiffs are the owners and holders of any shares of the common capital stock of the defendant Citizens Gas Company, but on the contrary allege that they hold and own only beneficial certificates of interest and allege that the voting trustees of the Citizens Gas Company hold all shares

of the common capital stock of said company, all as hereinafter in Subdivision 20 of this answer more particularly set forth.

2. These answering defendants admit the averments of the second subdivision of plaintiffs' bill of complaint.

3. These answering defendants admit the averments contained in the third subdivision of plaintiffs' bill of complaint that the defendants Henry Kahn, Robert Lieber, Gustave A. Schnull, Thomas L. Sullivan and Lucius B. Swift, defendants herein, are citizens of the State of Indiana residing in the City of Indianapolis in said state, District and Division, but deny that said defendants individually purport to act as trustees or as a body purport to act as a Board of Trustees of all the common capital stock of the Citizens Gas Company defendant hereto; on the contrary, these answering defendants allege that said named individuals constitute and are the duly legally qualified and acting voting trustees of the Citizens Gas Company, all as hereinafter in Subdivision 20 of this answer more particularly set forth.

4. These answering defendants admit the averments contained in the fourth, fifth and sixth subdivisions of the plaintiffs' bill of complaint.

5. These answering defendants admit the averments of the seventh subdivision of the plaintiff's bill of complaint that the ground upon which the jurisdiction of this court depends is diversity of citizenship between each and all of the plaintiffs and each and all of the defendants and that the residence of all the defendants is in the Indianapolis Division of the Southern District of Indiana, but deny that the defendants, under color of certain statutes of the State of Indiana, are attempting to deprive the plaintiffs and other certificate holders of the Citizens Gas Company of property and contract rights, contrary to the provisions of Article I Section 10 of the Constitution of the United States or contrary to the provisions of the Fourteenth Amendment thereto. These answering defendants admit that the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum or value of \$3,000.

6. These answering defendants admit that on or about the 25th day of August, 1905, the City of Indianapolis granted a franchise to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, their associates and assigns for a period of twenty-five (25) years; that a correct copy of said franchise marked Exhibit "A" is attached to plaintiff's complaint and made a part thereof and that certain por-

tions, but not all of said franchise, are correctly copied in said Subdivision 8 of said complaint.

7. These answering defendants admit that said ordinance was adopted without first submitting any question as to the proposed acquisition of the property and plant of the Citizens Gas Company to the qualified voters of the City of Indianapolis at a special or general election, but deny that such an election was required as a condition precedent to the enactment of said ordinance and deny that by failure to submit said question to said voters the provisions of paragraphs (f) and (g) of Provision 1 of said ordinance were or are null and void. These answering defendants further deny that the provisions of paragraphs (f) and (g) of Provision 1 of said ordinance are null and void and that said paragraphs attempted to create an interest in property vesting on a contingency more remote and that paragraph (i) of Provision 1 and Provision 22 thereof attempted to allow the exercise of options by said city at a time more remote than permitted under the common law of Indiana or under the statutes thereof then in force relating to perpetuities and alienations and deny that said provisions or any of them are or have been illegal or void.

8. These answering defendants admit the averments contained in the ninth and tenth subdivisions of plaintiffs' complaint.

9. These answering defendants admit that at the time the certificate of the Articles of Incorporation of the defendant Citizens Gas Company was subscribed and filed, Chapter 139 of the Acts of the Indiana General Assembly for the year 1905 was in full force and effect and that it required such certificate to include the various statements included in Items (a) to (f), both inclusive, of subdivision eleven of the plaintiffs' bill of complaint, but these defendants deny that said Act provides that such certificate should state only and solely certain facts as set forth in said items (a) to (f) and deny that said Act did not authorize any thing other than such facts to be stated in such certificate. These answering defendants admit that except for amendments not here material, such statute has been in effect at all times herein mentioned and deny that the provisions of said certificate setting forth the provisions of the ordinance of 1905 were and are surplusage under said Act and void.

These answering defendants allege that it was at that time and always since has been the law in Indiana that Ar-

ticles of Incorporation could contain valid and binding agreements although such agreements were not included in the facts required by law to be stated in the Articles of Incorporation, provided such agreements are not inconsistent with any of the provisions of law.

These defendants further allege that the provisions contained in said Articles of Incorporation respecting the acquisition by the City of Indianapolis of the plant and property of the Citizens Gas Company were to evidence the creation of a public charitable trust, all as hereinafter in Subdivision 20 of this answer more particularly alleged and that the insertion thereof in said Articles of Incorporation and the certificate filed with the Secretary of State was entirely legal and that the inclusion of such provisions in the Articles of Incorporation was legalized by the Act of 1929, as hereinafter more particularly averred.

These defendants further allege that each and every holder and owner of trustees' certificates of beneficial ownership in the first million dollars of capital stock issued by the Gas Company agreed, in the manner alleged in subdivision 20 hereof, by the execution of the subscription agreement and the acceptance of the trustees' certificates as therein alleged, to the inclusion in said articles of incorporation of said provisions, and each and every holder of trustees' certificates of beneficial ownership in the second million dollars of said capital stock, by buying pursuant to the published notice referred to in subdivision 20 thereof, and by accepting the trustees' certificates referred to in subdivision 20 hereof ratified and agreed to the inclusion of said provisions in said articles of incorporation and these defendants say that by reason of the foregoing facts, neither these plaintiffs nor any others similarly situated, can now object to the said agreement contained in said articles of incorporation nor question the validity of such provisions in said articles or in the amendments thereto.

10. These answering defendants admit the averments contained in the twelfth, thirteenth and fourteenth subdivisions of the plaintiffs' bill of complaint.

11. These defendants admit the allegation in subdivision fifteen of the plaintiffs' bill of complaint that said increased capital stock of the Citizens Gas Company was sold by the Gas Company at public auction to the highest bidders for a price in excess of \$400,000 above the par value thereof, without requiring the purchasers at the time of purchase, or at any time, to execute a written stipula-

tion that the power of holding and voting said capital stock might be irrevocably given to holding trustees as required by a statute of Indiana, Chapter 58 of the Acts of 1889, page 91, then in full force and effect, and these defendants admit that the voting trustees caused to be delivered to themselves, took possession of, held and continued to hold and vote the certificates representing said shares of increased capital stock and issued to the stockholders in lieu thereof, trustees' certificates substantially in the form of Exhibit "E" attached to the plaintiffs' complaint herein evidencing the holding of said certificates by them, but these defendants deny that said voting trustees in so doing acted without authority and say that all of said increased capital stock was sold pursuant to public notice all as required by said Articles of Incorporation of said company and in which notice it was expressly stated that all stock sold should be issued in all respects conformably to the terms and conditions of the Articles of Incorporation and franchise of the Citizens Gas Company relating thereto. The circumstances surrounding the issuance of said certificates and the charitable trust created by said Articles of Incorporation and said franchise with reference to the property of the Citizens Gas Company of Indianapolis are hereinafter more particularly set out in Subdivision 20 of this answer.

12. These defendants for answer to subdivision sixteen of the plaintiffs' complaint admit that for a considerable period prior to 1921 the operations of the Citizens Gas Company in the City of Indianapolis were at a financial loss and that in the month of August, 1921, the situation was acute; but deny that in addition to bonds which the Gas Company had previously issued and sold to finance extensions and additions to its plant it had a floating indebtedness in excess of \$2,600,000; deny that said company was unable to fund the same by the issuance and sale of preferred stock because of the provisions of said franchise of 1905 and deny that it was unable to fund the same by the sale of bonds because of its precarious financial condition; these defendants further deny that said company was faced with the danger of defaulting in payments of interest and principal on its outstanding obligations with a possibility of foreclosure and receivership. The defendants admit that the common stock of said company had been sold at prices ranging from a minimum of \$25 to a maximum of \$40 per share, but say that they have no knowledge as to whether such stock was then selling in the open mar-

ket at prices as low as \$18 per share, but if the same be material leave the plaintiffs to make proof thereof. These defendants further deny that the company's financial condition rendered impossible the making of additions, extensions or betterments of its plant needed for public service. These defendants further deny that in the financial condition of said company the claimed right of the city to purchase the plant and property of the Gas Company pursuant to the terms of the franchise of 1905 was wholly valueless and deny that the price at which the city must purchase thereunder was substantially more than the then value of its property. These defendants say that the financial condition of the company as hereinabove referred to and as referred to in subdivision sixteenth of the plaintiffs' complaint was due primarily, if not altogether, to the fact that by the terms of its said franchise a rate of sixty cents per 1000 cubic feet was fixed as the maximum rate which could be charged for gas and that it had prior to August, 1921, been able to obtain a higher rate for gas only through the procurement of emergency relief from the Public Service Commission of the State of Indiana and that it was impossible under such circumstances for it to procure a rate for gas having such quality of permanency as would enable it to stabilize its financial position.

13. These defendants admit the allegations set forth in subdivision seventeen of the plaintiffs' complaint except in so far as the facts as therein set forth are alleged to follow upon and because of the situation as set forth in subdivision sixteen of said complaint and which facts have been in part denied in the preceding paragraph hereof.

14. These defendants admit the facts set forth in subdivision eighteen of the plaintiffs' complaint herein.

15. Answering subdivision nineteen of the plaintiffs' complaint these defendants deny that by the surrender of said franchise said Gas Company subjecting itself in all its operations to the Shively-Spencer Utility Commission Act and thereupon all rights, duties and obligations of the Gas Company under said franchise of 1905 and under the provisions of its Articles of Incorporation inserted pursuant thereto and all rights, duties and obligations of the city thereunder terminated and in substitution therefor the Gas Company and the city acquired the rights, duties and obligations defined by the terms of said Act. For a more particular statement as to the effect of the surrender of said franchise upon the operations of said Gas Company and the rights of the City of Indianapolis and its inhabitants in



and to the property of said company, reference is made to paragraphs 20 and 21 of this answer.

These defendants admit that subsequent to the surrender of said franchise the company was able to finance necessary extensions, additions and betterments to its plant and to refund its floating indebtedness by the issuance and sale of preferred stock and bonds and to discontinue the existing non-compensatory rates and otherwise to put and maintain its property devoted to public service in a sound operating condition to meet the expanding needs of its service, but these defendants say that such results flowed primarily, not from the surrender of said franchise, in August, 1921 but from the action of said company through proceedings instituted in the year 1922 in the United States District Court for the District of Indiana in securing compensatory rates for the use of its property devoted to public service.

16. These defendants admit the allegations in subdivision twentieth of the complaint concerning the adoption of a resolution increasing the capital stock of the Citizens Gas Company of Indianapolis and concerning the execution of a Certificate of Amendment of the Articles of Incorporation of the Gas Company in the respects set forth in said subdivision and further admit that true copies of said certificate of increase and certificate of amendment of the Articles of Incorporation are attached to the complaint as Exhibits "H" and "I" and that said certificates were filed in the office of the Secretary of State August 27, 1921. These defendants deny that the said voting trustees, in assuming to execute said amended Articles of Incorporation were wholly without authority, in fact or in law, to execute the same. They deny that they were not the stockholders of said company, either of record or otherwise, at the time of executing said purported certificate amending said Articles and allege that as appears from the terms of the stock certificates themselves, the certificates of beneficial ownership therein and the Articles of Incorporation of the company pursuant to which the same were issued, all of said stock was to be held and was held solely by said trustees with the sole right to vote the same and that in voting the same for such amendments to the Articles of Incorporation they exercised the expressed powers given to them by the terms of said certificates and said Articles of Incorporation. These defendants further deny that the amendments attempted to be made were not confined to the subject matter permitted by the statutes of Indiana in force



in 1921, as alleged in paragraph eleven of said complaint, and further, with reference to said voting trust, the reason for the creation thereof and the scope of the powers of the Voting Trustees, these defendants refer to paragraph 20 of this answer. These defendants deny that said voting trustees were not authorized by any terms of the voting trust to vote the stock of the company in order to perpetuate or increase or otherwise modify the powers of the voting trustees, or to sign and acknowledge any instrument as the stockholders of the Gas Company, or to make a new or amended contract affecting the rights or property of the stockholders or otherwise to vote the stock of the company or represent the stockholders of the company in amending Articles of Incorporation and allege that said voting trustees had full power and authority under the provisions of said voting trust as embodied in the Articles of Incorporation of said company and as referred to in the certificates issued representing the stock of said company and the beneficial interest in said stock to vote all the stock of said company and to do all other things as stockholders which it might be found wise or expedient in their judgment to do for the best interests of said company not inconsistent with the objects, provisions and purposes of said trust as embodied in the Articles of Incorporation of said company and these defendants allege that all of the amendments so made in said Articles of Incorporation were consistent with such objects, provisions and purposes, and the action of said voting trustees in voting said stock for the adoption of such amendments was consistent with and within the powers so granted to them.

These defendants further say that at the same meeting of the voting trustees of said Citizens Gas Company at which resolutions were adopted providing for the amendments to the Articles of Incorporation as set forth in Paragraph twentieth of the complaint herein, said voting trustees also adopted a resolution providing for the surrender of said franchise from the City of Indianapolis and that both of said actions by said voting trustees were part and parcel of the same proceeding of said voting trustees. That pursuant to said resolutions said franchise was surrendered as provided by law and the certificate certifying to such amendments to the Articles of Incorporation of said company was filed with the Secretary of State of the State of Indiana on the same date.

17. In answer to the twenty-first subdivision of the plaintiffs' bill of complaint these defendants admit that

early in the year 1929 the legislature of the State of Indiana enacted an Act with the title thereto as set out in said subdivision, and that said Act contained an emergency clause to give it immediate effect upon its passage, was approved by the governor, and became effective March 11, 1929.

These defendants admit the bill for said Act was prepared by the representatives of the City, and introduced in the legislature by members residing in such City, and was enacted by the legislature in the exact form in which it had been so prepared, but these defendants say that said facts are not material in this cause.

These defendants admit that said Act provides in effect that if in the original articles of incorporation of any corporation organized prior to May 1, 1913, that being the date of the creation of the Public Service Commission of this State, for the purpose of furnishing natural or artificial gas for fuel or illuminating purposes or for furnishing electric lights and water to the citizens of any city, or to furnish light, heat and power to any city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such city, subject to the outstanding legal obligations of such corporation, whenever the holders or owners of shares of stock or beneficial interest therein shall have received the par value of such shares of stock or certificates of beneficial interest, together with dividends as provided in such articles, such provisions in such articles are by said Act legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any shares of such stock, stock certificates or beneficial interest therein, or their assigns.

These defendants deny that said Act was passed for the sole and only purpose of attempting to legalize any invalid and illegal provision of the articles of incorporation of the Gas Company as alleged in said bill of complaint.

These defendants say they are without knowledge as to whether at the time of the passage of said Act, any other corporation in the State of Indiana came within the provisions of said Act, but these defendants allege that said Act is general in its provisions and applies to any and all corporations organized for the purpose of furnishing public service of the character therein described to any town or city or the inhabitants thereof, and which was organized prior to May 1, 1913, that being the date when the Shively-Spencer Utility Commission Act became effective in said

State, and in the articles of incorporation of which provisions were made for the conveyance of the property of such utility to any such town or city upon the retirement of the capital stock or the payment to the holders or beneficial owners of such capital stock at the face value thereof.

Said defendants deny that said Act is unconstitutional and void for any of the reasons set out in said subdivision of the bill of complaint, or for any other reasons.

These defendants deny that said Act impairs the obligations of contracts existing at the time of its passage between the State of Indiana and the Gas Company and its stockholders created by the provisions of the Shively-Spencer Utility Commission Act, the surrender of the franchise of 1905 and the acceptance of an indeterminate permit pursuant thereto, and deny that said Act is in violation of Article I Section 10 of the Constitution of the United States, or of Article I, Section 24 of the Constitution of the State of Indiana.

These defendants deny that said Act deprives the stockholders of the Gas Company of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and deny that it results in the confiscation of the property of the stockholders of the Gas Company without just compensation, in violation of Article I Section 21 of the Constitution of the State of Indiana.

These defendants admit that said Act has the effect of legalizing the articles of incorporation of the Gas Company as set forth in the bill of complaint, and grants to municipal corporations the power to accept a conveyance of the property of such Gas Company in accordance with such provision without submitting the question of such acquisition to a general election, and that said Act provides that such city may acquire such property in accordance with such provision without submitting the question of such acquisition or the terms and conditions thereof to the Public Service Commission.

These defendants deny that said Act deals with three separate and unrelated subjects, in violation of Article IV Section 19 of the Constitution of the State of Indiana, and deny that it confers privileges and immunities in violation of Article I Section 23 of the Constitution of the State of Indiana, and denies the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

These defendants deny that said Act attempts to create

a corporation other than banking and to confer powers thereon by special act, contrary to the provisions of Article XI, Section 13 of the Constitution of the State of Indiana.

These answering defendants say that said Legalizing Act of 1929 is valid in all respects. Said Act only legalizes a contract voluntarily made by said corporation with the State in its Articles of Incorporation and in the amendments thereof and enables said City to take said property in accordance therewith. Said Act does not attempt to revive any obligation abrogated by the surrender of said franchise, but only places the express stamp of approval by the State on a contract made by said corporation and which survived the surrender of said franchise.

Said act does not deprive the plaintiffs of the equal protection of the law by providing for an invalid classification. The classification to which it applies is a self-created class consisting of corporations who voluntarily placed in their articles of incorporation provision for the transfer of their properties prior to the time when the new rules in said Shively-Spencer Act governing such transfers came into effect, on to-wit: May 1, 1913. Said Act does not impose on said class any obligations, but merely approves self-imposed obligations contained in articles of incorporation. Said corporation is not complaining of said Act, but is voluntarily performing its obligations which said Act approves. Plaintiffs cannot complain of said Act for the reason that they, through said board of trustees having power to vote all stock, have given their consent to the performance of said obligation, and further because they are not injuriously affected by said Act in that they took their rights subject to the obligation which said Act approves.

Plaintiffs cannot complain on the ground that said Act should also, to be valid, have approved similar provisions appearing only in franchises held by corporations for the reason that they are not injured by such exclusion. Only an excluded corporation could complain on that ground if any such ground of complaint exists.

Said defendants say that said Act is not invalid in that it provides a method for effecting the acquisition of the instant property different from the methods provided for in said Shively-Spencer Act, or the Act of 1905, mentioned in plaintiffs' complaint. Said Acts do not apply to cases, as the instant one, where a corporation owns its property subject to a trust and an obligation to transfer its property in accordance with an agreement contained in its articles

of incorporation. The Act of 1929 directly approves provisions for the transfer of property subject to trusts and obligations voluntarily created by the corporations included in the class to which the Act applies. Plaintiffs are not injuriously affected by said Act on account of approval therein by the legislature of the transfer in question without the submission thereof to a vote or to the Public Service Commission. By such direct approval said Act only provides for the transfer which said corporation voluntarily agreed to, and which the plaintiffs and all other holders of certificates of beneficial interests in said stock agreed to by accepting their certificates wherein said conditions for surrender of said stock and the transfer of said property were incorporated. If said provisions for transfer of said property are not as advantageous to plaintiffs as transfers under the provisions of other statutes, in the absence of such contract, might be, such disadvantage is not created by said Act of 1929, but is a disadvantage voluntarily created by said corporation when it agreed to make such transfer and voluntarily acquiesced in by plaintiffs when they purchased said certificates subject to such obligation to transfer, and said Act cannot be invalid as to plaintiffs in such situation.

These defendants further allege that if said Act is a special law and only applicable to the Citizens Gas Company and said City, it is valid. That the General Assembly of the State of Indiana could have authorized the inclusion in the articles of incorporation of such corporations of the provisions contained in the articles of the Citizens Gas Company before the same was formed, and it could and did legalize such provisions by said Act of 1929.

Said defendants say that said Act of 1929 is not duplicious. The subject on which it legislates is the transfer of utility properties under agreement to transfer expressed in articles of incorporation.

The provisions approving and legalizing such agreements and those enabling cities to take under such agreements are matters properly connected with said subject and are in aid of the main object of said Act to give effect to such agreements to transfer. Said Act of 1929 is in all respects valid.

18. Answering the allegations contained in Paragraph Twenty-Second of the complaint herein, these defendants admit that at the time the franchise of 1905 was granted by the City of Indianapolis, the Indianapolis Gas Company was furnishing gas in the central portion of the City under



a franchise from the City; that the City was dissatisfied with the monopolistic position of the Indianapolis Gas Company and with the rates then being charged by it, but deny that said franchise of 1905 was granted largely to provide competition and to procure a lower rate for gas for its inhabitants, although admitting that the public spirited citizens of Indianapolis who promoted said enterprise did have these objects and others in mind, and these defendants deny that the provisions for the Voting Trust as hereinbefore set forth were inserted principally for the insuring that the control of the Citizens Gas Company should not pass to the Indianapolis Gas Company or its stockholders.

Defendants admit that it was provided in said franchise of 1905 that no Voting Trustee of the Citizens Gas Company should be an employee or stockholder of the Indianapolis Gas Company; that after the passage of the Shively-Spencer Act of 1913 the Citizens Gas Company, pursuant to an order of the Public Service Commission of Indiana and with the full consent and approval of the City of Indianapolis, entered into a contract whereby it leased from the Indianapolis Gas Company all its plants and property for a period of ninety-nine years; that, as a condition to the making of said lease, the Indianapolis Gas Company was required to surrender its franchise in the City and to accept in lieu thereof an indeterminate permit as provided in said Act and the Gas Company was required to subject its rates to the control of the Public Service Commission as fully as if it had surrendered its franchise and received in lieu thereof an indeterminate permit under the provisions of said Act and was required immediately to reduce its rates. These defendants deny that with the making of said lease and the passing of all property devoted to the service of manufactured gas in the city to the control of the Citizens Gas Company, and the subjection of the rates to the control of the Public Service Commission, the original purpose of the City failed and the reasons for the existence of said Voting Trust and of many of the provisions of said Ordinance of 1905 disappeared, and allege that quite to the contrary, the prime purpose of the City and the reasons for the existence of said Voting Trust continued in full force and effect, all as is more particularly set out and alleged in Subdivision 20 of this answer.

These defendants admit that the plant and property subject to said ninety-nine year lease and the business and the public service furnished thereunder were in some respects

more extensive and have at all times been more extensive than those of the Citizens Gas Company, but they deny that the business and public service furnished through the property of the Indianapolis Gas Company were at that time or have since been in all respects more extensive than those of the Citizens Gas Company.

These defendants admit that since 1913 the Citizens Gas Company with full knowledge and consent of the City has operated the combined properties under the provisions specified by the Commission and has used its earnings and its financial credit in the making of extensions, improvements and betterments, both to its own property and to the property subject to said lease.

These defendants admit that at the time of the surrender in 1921 of said franchise of 1905, the City neither objected to nor protested said surrender, but deny the averment of plaintiffs' bill that "the apparent purpose of the surrender was to extinguish all original franchise obligations not already destroyed by acquiescence of the parties in said transactions of 1913," relating to the lease of the property of the Indianapolis Gas Company by the Citizens Gas Company.

These defendants further admit that thereafter the Citizens Gas Company openly conducted its operations in the city and elsewhere in accordance with the provisions of said Shively-Spencer Act and thereafter did not in any respect comply or attempt to comply with any of the terms and provisions of said surrendered franchise of 1905, except to this extent, that said Citizens Gas Company has at all times recognized the limitations contained in said franchise and in its Articles of Association restricting the amount of dividend which can be paid upon its common stock, and in addition thereto it has, as alleged elsewhere in said complaint, taken steps looking to the partial retirement of the principal of its common stock in accordance with the provisions of said franchise of 1905 and the provisions of its Articles of Incorporation, and except that at all times it recognized the existence of the public charitable trust as set forth in Subdivision 20 of this answer.

These defendants further admit that during all of this time until said City recently caused legislation to be perfected, introduced and enacted as alleged in Paragraph Twenty-one of the complaint herein said City, with full knowledge of the surrender of said franchise and of the fact that the business and service of the Gas Company was being conducted pursuant to the terms of said Act as here-



inbefore alleged made no protest or objection thereto and made no demands or claims of any kind upon the Gas Company to comply with said surrendered franchise, but these answering defendants allege that the City of Indianapolis has never at any time either by conduct or acquiescence waived or attempted to relinquish said trust impressed on the property and plant of Citizens Gas Company. As to the allegation that said City acquiesced in said surrender and subsequent operations, these defendants neither admit nor deny the same but leave to the plaintiff to make proper proof thereof.

These answering defendants deny the allegations in said Paragraph Twenty-two of the complaint that the stockholders of the Gas Company relying upon the acquiescence of the City in said surrender bought and sold shares of the common stock of the Gas Company in open market with the understanding that the City no longer had or asserted or claimed any rights under the franchise of 1905 and the Articles of Incorporation adopted pursuant to its conditions, but allege that each person who purchased a beneficial certificate accepted the same under an express agreement that the City had the right to acquire said property; as to the allegations that due to the improved condition of the Company brought about as stated in the complaint the stock of the Gas Company increased in market value until it reached in the year 1928 the price of \$57 per share in the open market and many of the present stockholders of the Gas Company purchased shares at that price and will, if said shares are subject to retirement at the price of \$25 per share as provided in the franchise of 1905 and the Articles of Incorporation adopted pursuant thereto, suffer as part of their damages a loss of the difference between said market value and said retirement price, these defendants have not sufficient knowledge as to the matters and facts so alleged but leave to the plaintiff to make strict proof thereof.

These defendants deny that by reason of the facts as alleged in said Paragraph Twenty-two and the reliance of the common stockholders thereon that the City is now estopped from asserting against the Gas Company any rights it otherwise might claim by virtue of said surrendered franchise and said Articles of Incorporation, and for a more detailed statement as to the effect of the surrender of said franchise, reference is made to Subdivision 21 of this answer.

19. These defendants admit that on the 20th day of

March, 1929, said City, acting through its Board of Public Works, adopted and subsequently presented to the Gas Company the resolution referred to in subdivision twenty-three of the bill of complaint, a copy of which is filed with said bill of complaint as Exhibit J, and admit that said resolution was presented after the surrender of said municipal franchise in 1921, but these answering defendants allege that the surrender of said franchise in 1921 and the fact that said city had taken no affirmative action since said time until the adoption of said resolution, did not deprive the said City of the rights demanded in said resolution and the right to have the property of said Gas Company conveyed to it in accordance therewith.

These defendants say that said City was and is entitled to have the property of said Gas Company conveyed to it pursuant to the terms of a public charitable trust with which all of the property of said Gas Company is impressed.

These defendants allege that said public charitable trust arose and was created, all as is alleged in subdivision twenty of this answer, the terms and provisions of which said trust are therein more specifically set out.

20. These answering defendants allege that a public charitable trust was created and exists in the plant and property of defendant Citizens Gas Company of Indianapolis in favor of the inhabitants and/or gas consumers of said City of Indianapolis, which trust was to be administered by the defendant Citizens Gas Company of Indianapolis and by the defendant City of Indianapolis as respective trustees thereof, in accordance with the terms of said trust, as hereinafter in this subdivision of this answer alleged.

That the facts in connection with the establishment of said public charitable trust were and are as follows:

That in the year 1887, the City of Indianapolis by an ordinance granted to the Consumers Gas Trust Company a franchise to furnish natural gas to the citizens of said City and vicinity upon the terms and conditions specified in said ordinance; that the supply of natural gas failed some time prior to 1904 and that an attempt was made by said Consumers Gas Trust Company to engage in the business of furnishing artificial gas to the citizens of Indianapolis; that as a result of this effort, litigation ensued in the District Court of the United States for the District of Indiana and the United States Circuit Court of Appeals for the Seventh Circuit, wherein it was held and finally adjudged as follows:

First. That the certificate holders of the Consumers Gas Trust Company of Indianapolis had the right to enjoin that company from engaging in the business of supplying artificial gas to the citizens of Indianapolis on the theory that such business was ultra vires the corporation.

Second. That under the franchise, Articles of Incorporation, Subscription Contracts and other relevant agreements, the City of Indianapolis had the right, by giving six months' notice, to purchase the property of the Consumers Gas Trust Company at any time after the expiration of ten years from the date of the ordinance, the amount to be paid for such plant to be determined by three disinterested appraisers.

Third. That a public charitable trust existed in favor of the inhabitants and/or gas consumers of Indianapolis in the property of the Consumers Gas Trust Company to the end that gas should be furnished at cost after the holders of beneficial certificates had received by dividends or otherwise an amount equal to their subscriptions and ten per cent. interest per annum.

That as a result of such litigation the City of Indianapolis was determined to have the right to purchase the plant and property of the Consumers Gas Trust Company and did in fact exercise such right by the assignment thereof for a nominal consideration to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, being the same identical persons to whom the franchise and ordinance set out in paragraph six of the plaintiffs' bill of complaint was granted, to the end that such persons should organize or cause to be organized the Citizens Gas Company of Indianapolis.

That the property formerly belonging to the Consumers Gas Trust Company was in fact purchased by the said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt and by them conveyed to the Citizens Gas Company of Indianapolis, defendant hereto; that as a result of said litigation there was a widespread public movement in the City of Indianapolis to the end that a Gas Company should be organized which should own the property and plant formerly owned by Consumers Gas Trust Company; that said property should be acquired through the medium of a new corporation in which the stockholders or the owners of beneficial certificates representing common stock should be entitled to receive only the re-payment of the face value of such beneficial certificates with interest thereon at the

rate of ten per cent. per annum until paid and that thereafter the city on behalf of the gas consumers of Indianapolis and the inhabitants thereof should have the right to acquire such property without the payment of any additional consideration; the plan was so formed for the purpose of avoiding that which had theretofore happened, viz: that the persons owning the beneficial certificates of stock should receive the face value of such certificates with interest and thereafter the city be compelled to purchase said plant and pay therefor a large sum of money.

That wide publicity was given by the public-spirited citizens engaged in the organization of the Citizens Gas Company of Indianapolis to the plan, including publicity in all of the newspapers in the City of Indianapolis, Marion County, Indiana, and that the essential elements of the plan and of the public charitable trust to be thereby created were stated and agreed upon as follows:

First. That all of the common stock of the Citizens Gas Company of Indianapolis should be issued to and perpetually voted by voting trustees to be appointed as provided in Section 6 of the original Articles of Incorporation which are set forth in Subdivision Seven of the plaintiffs' bill of complaint.

Second. That such Trustees should issue to each subscriber to the capital stock of the company a beneficial certificate and that the holder thereof should be entitled to re-payment of the face value of the same out of dividends or otherwise with interest at the rate of ten per cent. per annum, payable semi-annually, and that when the face value of such certificate had been paid the holder should have no further interest in the property and plant of the Citizens Gas Company.

Third. That when said certificate holders have been paid in full the City of Indianapolis should have the right to acquire said property for the benefit of the public and the consumers of gas in Indianapolis without the payment of any money or further consideration.

Fourth. That a public charitable trust to be administered by the Citizens Gas Company of Indianapolis and the City of Indianapolis respectively as trustees was to be and was created in the property and plant of the Citizens Gas Company of Indianapolis to the end that private exploitation thereof should be prevented and that gas should be supplied at the lowest possible cost to the citizens of Indianapolis who should desire to use the same.

It was necessary, in order to acquire the property and plant formerly belonging to the Consumers Gas Trust Company, to interest local capital in the enterprise and for the purpose of inducing the persons who should invest in the common stock of said company to make such investment upon the condition that they should never receive any more than a return of the face value of said certificate, it was proposed and agreed that interest thereon should be paid at the rate of ten per cent. per annum.

Fifth. Said plan contemplated that the Citizens Gas Company of Indianapolis should be the Trustee of said public charitable trust until such time as said certificate holders were repaid the face value of their certificates with interest at the rate of ten per cent. annually and that thereafter the City of Indianapolis should acquire said property for the benefit of the gas consumers and inhabitants of said city, but that it was never intended that title to the plant and property of said Citizens Gas Company should be vested and it was not in fact vested in the City of Indianapolis as an agency of the State, but solely for the benefit of the inhabitants of said city and particularly those who at that time or thereafter should desire to use the gas to be supplied by said company.

That each of the original subscribers to the common capital stock of the Citizens Gas Company with which it was to begin business, to-wit: One Million Dollars par value thereof was required to and did execute subscriptions to the capital stock of the Citizens Gas Company upon the form set out as a part of the bill of complaint and marked Exhibit B.

That all present holders of beneficial certificates representing their ownership of the first one million dollars to be issued of the common capital stock of the Citizens Gas Company acquired the same either directly or by mesne assignments from the original subscribers to said capital stock and each and all of such present holders of said beneficial certificates had full knowledge and notice at the time of such acquisition, of the terms of said subscription contract hereinbefore set out; that said subscription contracts constituted and were a part of the general plan to form said public charitable trust.

That after the organization of the Citizens Gas Company of Indianapolis the voting trustees issued to each subscriber of the common capital stock and thereafter to all purchasers of such stock a trustee's certificate in the



form set out as a part of the bill of complaint as Exhibit E thereof.

That there was issued to each of the plaintiffs as evidencing his beneficial interest in said stock a trustee's certificate in said form, duly signed by the President of the Board of Trustees of said Voting Trustees, and attested by the President and Secretary, respectively, of the Board of Directors of said Gas Company, and each of said plaintiffs now have and hold such certificates in such form, and in which certificates it is agreed that the capital stock of said Gas Company shall be and remain under the exclusive and irrevocable control of said Board of Five Trustees and their successors, with full, complete and exclusive and irrevocable power in said Board of Trustees to hold said stock and vote the same during the continuance of the Citizens Gas Company of Indianapolis as a corporation, for all uses and purposes in the articles of incorporation of said Company mentioned, set forth and described.

It is further provided in said certificates so held and received by the plaintiffs that when said certificate holder shall have received by dividends or otherwise upon said certificate an amount equal to the face value thereon, together with interest thereon at the rate of ten per cent. per annum, payable semi-annually, then such certificate shall be fully paid and cancelled and the interest of said holder in said Company and its assets shall thereupon cease, and the property of said Company shall be disposed of as provided in such articles of incorporation.

That on the 25th day of March, 1911, pursuant to the provisions of Article 4 of the Articles of Incorporation of the Citizens Gas Company of Indianapolis, as set out in Subdivision Seven of the plaintiffs' bill of complaint, the common capital stock of said Company was increased from One Million Dollars to Two Million Dollars, and thereafter, from time to time, prior to July 1, 1919, said additional One Million Dollars of common capital stock was sold at public auction to the highest bidder therefor after giving thirty (30) days' notice of the time and place of such sale by publication in three Indianapolis newspapers having the largest city circulation, all as provided in said Article 4 of said original Articles of Incorporation.

That in said published notices of the offering of said additional common stock for sale at public sale, it was specifically stated that all stock sold should be issued in

all respects conformably to the terms and conditions of the Articles of Incorporation and franchise of the Citizens Gas Company relating thereto.

That all of said additional One Million Dollars of common stock was sold, pursuant to such notices of sale, and Trustees' certificates representing the beneficial ownership of said additional One Million Dollars of Common stock were issued to the purchasers at such public sales, or their nominees, in the form of the certificate hereinabove set out, and no other form of certificate or other evidence of ownership was ever issued to any of such purchasers of the nominees of any such purchasers.

That all subsequent owners of any of said second Million Dollars of common stock, upon acquisition thereof from prior owners thereof, received, and the present owners thereof now hold, Trustees' certificates of beneficial ownership in the form hereinabove set out, and there has never been issued or authorized any other form of certificate representing any part of the Two Million Dollars authorized common capital stock of the company other than the Trustees' certificates of beneficial ownership in the form hereinabove set out.

That the plaintiffs and each and every present or former holder of trustees' certificates has received, accepted and held such trustees' certificates containing the specific agreements hereinbefore set forth and has never at any time had any other evidence of his ownership of the beneficial interest in the Citizens Gas Company and that the plaintiffs and all other holders of beneficial certificates of the Citizens Gas Company of Indianapolis, defendant hereto, are bound by each and all of the terms and conditions of the foregoing subscription contract and beneficial certificates as well as by the provisions of the franchise contract, the Articles of Association, the amendments thereto and the public charitable trust created at the time of the organization of the Citizens Gas Company of Indianapolis, defendant hereto, as in this paragraph of answer specifically alleged.

That neither the plaintiffs nor any other present holder of such beneficial certificates has ever objected or protested against the form of such beneficial certificates or the covenants or agreements therein contained or in any way at any time evidence his unwillingness to be bound thereby until within the last few months when publicity was given to the plan of the City of Indianapolis to ac-



quire the plant and property of the Citizens Gas Company; that at no time either before or after such mentioned publicity has the plaintiff or any other holder of beneficial certificates of the Citizens Gas Company of Indianapolis surrendered or offered to surrender the same or asked or demanded for the issuance to him or them of certificates representing their beneficial ownership free from the conditions above set forth.

21. These answering defendants allege and say that the City of Indianapolis now has all of the rights in and to the property of the Citizens Gas Company of Indianapolis as claimed by it in the resolution set out in Subdivision Twenty-third of plaintiffs' complaint, as Exhibit J, and as recognized in the several resolutions of the board of directors and the board of trustees of said corporation set out in Subdivisions Twenty-fifth and Sixteen of said complaint, as Exhibits L and M, that the surrender of said franchise did not, and legally could not, take said rights from said city, or impair in any manner the aforesaid trusts or the rights, interests and obligations thereunder. As to the effect of the surrender of said franchise upon the said rights of said city, these defendants allege more particularly as follows:

(a) That it was the desire of the public-spirited citizens of Indianapolis who promoted the formation of said public charitable trust, as set forth in Subdivision 20 of this answer, of the City of Indianapolis and of said Citizens Gas Company, that said public charitable trust and the terms and conditions thereof should, for the protection of all concerned, be evidenced in every possible way. In order to accomplish such purpose, the dominant terms and conditions of said trust were placed in the franchise contract itself, in the Article of Incorporation of the Citizens Gas Company and the amendments thereto, in the subscription contracts and in the beneficial certificates issued by the trustees of the Citizens Gas Company. These answering defendants allege that the agreement so arrived at was not intended to be merely a part of the franchise contract or of the Articles of Incorporation, or of the subscription contracts, or of the Trustees' Certificates, but was stated in each and all of said papers and writings for the purpose aforesaid and in order to evidence the public charitable trust which had been created and which was to continue to exist and which trust could not be abrogated by the surrender of said franchise.

(b) Any provisions contained in the ordinance granting said franchise which provide for the retirement and cancellation of the common stock and the conveyance of such property to the city, were not abrogated by the surrender of the municipal franchise to the state, but the surrender of such franchise only had the effect herein alleged in sub-paragraph (c) (2) hereof, and all such provisions relating to the retirement of such stock and the conveyance of such property continued and remained in full force and effect after the surrender of such franchise and are still in full force and effect.

The voting trustees of the defendant Citizens Gas Company, at a meeting thereof held on the 11th day of August, 1921, adopted a formal resolution authorizing the surrender of said franchise and at the same meeting of said voting trustees a formal resolution was adopted authorizing the amendments to the Articles of Incorporation of said Gas Company which are particularly set forth in Subdivision Eleven of the bill of complaint herein; that by such action of said voting trustees taken at such meeting in authorizing the surrender of said franchise and the amendment of its Articles of Incorporation the purpose of said trustees was plainly evidenced and expressed to preserve and protect all rights of the City of Indianapolis and the inhabitants thereof in and to the property of the Citizens Gas Company.

These defendants further say that under the provisions of Section 53 of the Act of the General Assembly of the State of Indiana, entitled, "An Act Concerning Municipal Corporations," approved March 6th, 1905, said City was authorized and empowered by ordinance to receive and accept public trusts and to agree to conditions and terms accompanying the same and bind such City to carry them out, and by the ordinance referred to in plaintiffs' bill of complaint and attached thereto as Exhibit A, the Common Council of said City did receive and accept the public trust created in the manner set out in Subdivision 20 of this answer and as provided in the Articles of Incorporation of the Citizens Gas Company, and did agree to the conditions and terms therein provided, and the surrender of said municipal franchise by said company did not abrogate or affect the public trust so accepted and agreed to; and said defendants further allege that independently of statutory authority said City had power to accept and execute public trusts.

(c) Even though it be held that the surrender of said franchise operated to abrogate all the terms and provisions embodied therein, such fact would not impair the rights of said city in and to the property of said Gas Company for the following reasons:

(1) The rights of said city in and to said property were never in favor of the state or of said city as the agent of the state and were in no sense subject to any power reserved in the State of Indiana by virtue of which it could make a legally effective offer to said corporation to abrogate the same.

(2) The only offer made by the state to said corporation in said Shively-Spencer Utility Commission Act was the offer to abrogate the franchise contract entered into by it, through said city as its agent, and said corporation, and to substitute therefor a new contract directly between itself and said corporation. The effect of such offer was to establish new contractual and regulatory relations between the state itself and said corporation, and, to that end, to substitute for the permit granted by the city, as such agent, an indeterminate permit direct from the state, and to substitute direct regulation as to rates and service by means of state legislation to be administered by the Public Service Commission for regulation by the agency of the City of Indianapolis as embodied in such franchise contract. Such offer did not include the abrogation of obligations owing by said corporation to anyone other than the state or to said city in its capacity as an agent of the state. Said offer did not include a proposition to surrender the corporate franchise of said corporation, or to abrogate the contract between the said corporation and the state which existed between them by virtue of the Articles of Incorporation of said company, or to abrogate said trust which was created as aforesaid, or to abrogate the obligations of said corporation to said city in its capacity as the beneficiary or prospective trustee of said trust, or to abrogate the rights and interest of the inhabitants of said city as beneficiaries of said trust, or as beneficiaries of the right to have said city acquire said property in accordance with said provisions for the acquisition of said property for their benefit. Said corporation could not, and did not, by surrendering said franchise, abrogate more than said offer included, and such surrender in no manner affected matters which were not a part of, or dependent upon, said franchise.

(3) Said rights of said city in its said capacity as the

prospective owner and/or trustee of said property, and the obligation of said corporation to transfer said property to said city, and said trust, and said rights and interests of the inhabitants of said city were not dependent alone upon the franchise which said corporation surrendered. Said franchise and the exercise of any rights thereunder were themselves dependent upon the prior creation of said obligations, rights, trusts and interests aforesaid. Notwithstanding the fact that the provisions for the acquisition of said property by said city were included in the original instrument by which said city granted said franchise, the said provisions and the obligations and rights thereby created were at no time solely dependent upon said franchise or on the terms and provisions constituting the contract or franchise. The facts hereinabove alleged relating to the circumstances existing prior to, and at the time of the granting of said franchise, together with said original instrument, show that said provisions were included in the same instrument which evidences the contract of franchise, in part for the purpose of providing what should be incorporated in the Articles of Incorporation of said company when it should be thereafter incorporated and it appears therefrom that a further and permanent agreement embodying said provisions should be the Articles of Incorporation of the corporation to be formed by the grantees of said franchise. The form of such permanent agreement was embraced in said original instrument, and the same was intended to be incorporated in said articles in *haec verba*. Such permanent agreement was intended to become a part of the corporate franchise thereafter to be granted by the state to the proposed corporation, made by the articles of incorporation between such corporation and the state, and, as there evidence was to be effective for the benefit of said city and its inhabitants. The provisions for the formation of said corporation and the inclusion of said permanent agreement for the acquisition of said property by said city in its articles constituted part of the consideration for the granting of said franchise by said city to said grantee and constituted conditions precedent to the exercise of any rights by said corporation under the said franchise to be assigned to it. The said circumstantial facts and said original instruments show that it was intended upon the organization of said corporation and the adoption of its Articles of Incorporation thereby to create vested rights

and interests on the part of said city and the inhabitants thereof in and to the property of which the corporation might become the owner and that said corporation should own such property subject to said rights and interests and the obligation to transfer its property to said city in accordance therewith.

(4) In conformity with the aforesaid intention of the parties to said original instrument, and in performance of said conditions precedent, the persons to whom said franchise was granted formed the contemplated corporation, the said Citizens Gas Company, defendant herein, and incorporated in its articles the said provisions for the acquisition of said property by said city, and assigned said franchise to said corporation. Said corporation was thus created and said provisions were thus incorporated in its articles of incorporation more than fifteen years before said corporation surrendered said franchise. Said provisions have ever since remained in, and are now a part of, said articles of incorporation. Said articles are a part of the corporate franchise of said corporation and constitute a permanent agreement between said corporation and the State of Indiana for the benefit of said city and its inhabitants, as aforesaid. By said provisions, said Citizens Gas Company became a trustee of its property for the purposes of said provisions. All of the property acquired by it became affected by said provisions and said trust, and the inhabitants and said city acquired vested rights and interests in and to all of said property, as aforesaid, before the said surrender of said franchise, and they are now the owners of said vested rights and interests. Said provisions in said articles, and said trust and said rights and interests have at all times since said incorporation existed wholly independently from said franchise. When said franchise was surrendered the said provisions in said articles, and the corporate franchise of said corporation, and said trust and said rights and interests, were not abrogated but remained unimpaired, and are now in full force and effect. The new contract arising between said corporation and the state upon surrender of said franchise, and the indeterminate permit as part thereof, do not in any sense supersede or abrogate said corporate franchise, said articles of incorporation or the contract made thereby, or said trust or any of said rights or interests. Any rights which said corporation may have under said indeterminate permit and under said new contract are subject to its obligations under said provisions in said



Articles of Incorporation and to said trust, and to said rights and interests on the part of said city and its inhabitants to have said property transferred to said city in accordance with said provisions in said articles. The provisions in said Shively-Spencer Act relating to the purchase of the property of a utility that has surrendered its franchise do not supersede said provisions for the transfer of its property contained in the Articles of Incorporation of said corporation, and said corporation has no right by virtue thereof to a purchase price for its property determined in accordance with the provisions of said act. Said act did not intend that said corporation could abrogate the contract made by its Articles of Incorporation and particularly by said provisions therein hereinbefore referred to, and did not intend that said trust and said obligations, rights and interests could be abrogated by the surrender of said franchise. The right of said city to the transfer of said property and the right of the inhabitants to have it so transferred, the obligation of said corporation to make such transfer, the said trust, and the said vested rights and interests in no degree depend for their existence on the franchise which was surrendered, but they arise out of an executed consideration and executed conditions precedent, and are efficaciously evidenced by said provisions in said Articles of Incorporation.

(5) The inhabitants of said city and the said city have a continuing right to the transfer of said property in accordance with said provisions. Said right was created and given by said corporation as a consideration for and condition precedent to the granting of said franchise and the exercise of any rights thereunder. The surrender by said corporation of its franchise did not in anywise surrender or abrogate the irrevocable rights of others which it had agreed to confer, and did confer, before it could receive and enjoy the thing with which it has voluntarily parted, viz : said franchise. Said corporation could, by said surrender, abandon or exchange the rights it received, but it could not escape its obligation provided for in the independent contract and which constituted the consideration and condition precedent which were essential to the existence and enjoyment of the rights granted it by said city.

(6) If the provisions for the transfer of said property constituted no more than an offer to make such transfer, the surrender of said franchise would not have operated to withdraw the same, inasmuch as said provisions have at all times appeared in said Articles of Incorporation

and such articles were unaffected by the surrender of said franchise. Coincident with such surrender said provisions were reincorporated in articles of amendment of said Articles of Incorporation. Neither said corporation nor plaintiff ever did anything to withdraw or to avoid said provisions in said original and amended Articles of Incorporation before said city made demand for performance. On the contrary, said corporation, by and through its board of directors, and its board of trustees having full power to represent plaintiff by virtue of the terms of said voting trust, is now carrying said provisions into effect in response to the demand made in behalf of said city, all as shown in Subdivisions Twenty-third and Twenty-fifth of plaintiffs' complaint. Plaintiffs' certificates, by virtue of which they claim the right to maintain this action, were issued and purchased by them after said franchise was surrendered, and the same have incorporated therein the same provisions for such transfer as appear in said original and amended articles. Said provisions were in effect when plaintiffs acquired said certificates, are a part of said certificates, and their rights in and to the property and assets of said corporation are subject to the rights of said city under said provisions for transfer.

(7) Said Citizens Gas Company of Indianapolis has at no time claimed, and is not now claiming, that the surrender of said franchise abrogated the right of said city to said property in accordance with said provisions. On the contrary, said corporation reaffirmed said provisions in said amended articles coincident with said surrender, as aforesaid, and it now intending to perform in accordance therewith. Plaintiffs are in no position to complain of said corporation's intention to transfer said property in accordance with said provisions for the reason that said provisions are a part of the contract between themselves and said corporation and they took their certificates subject to said provisions, also for the reason that so far as their consent is material to performance of said provisions by the corporation such consent is being given by said board of trustees, who have full authority to give such consent for plaintiffs by virtue of their power under said voting trust to vote all of the stock of said corporation on all matters affecting said corporation.

22. These answering defendants admit the allegations contained in subdivision twenty-four of the plaintiffs' bill of complaint.



23. These answering defendants admit the allegations contained in the twenty-fifth subdivision of the plaintiffs' bill of complaint.

24. These answering defendants, in answer to the twenty-sixth subdivision of the plaintiffs' bill of complaint, deny that the only purpose of creating the voting trust therein referred to, other than as previously set out in the plaintiffs' bill of complaint, was to carry out and make effective the rights of the city under said franchise of 1905, and deny that upon the surrender in 1921 of said franchise, all rights, duties and obligations thereunder, and under the Articles of Incorporation, terminated, and deny that the voting trust ceased to serve any useful or lawful purposes whatsoever, and deny that since said date said voting trust has existed only by the sufferance of the common stockholders of the Gas Company, and deny that in respect of the holders of the second million dollars issue of the common stock of the Gas Company there was no legal basis for the maintenance and/or validity of said voting trust, and deny that from the beginning said trust has existed in respect of such shares only at the sufferance of the owners thereof, but allege that said voting trust was performed and agreed to by all of the holders of said trustee's certificate, including these plaintiffs, in the manner and for the purposes set out in subdivision 20 of this answer.

These defendants deny that at the present time said voting trust operates to sever perpetually the voting rights of all the common stock of the Gas Company from the ownership of said stock without any lawful purpose or object to support such separation, and deny that the same is illegal and void.

These answering defendants deny that in voting said shares said Voting Trustees have not in the past, and deny that by their adoption of said resolution and their public utterances they have indicated that they will not in the future, consult the wishes or act for the benefit of the owners of said stock in voting the same, and deny that without regard to the wishes or rights of said owners they will vote said stock for the destruction of the rights of the common stockholders of said Company, but allege that said trustees have in the past, and intended in the future, to exercise their rights and perform their duties as such Voting Trustees in strict accordance with the power and obligations conferred upon them, as is more fully set out in subdivision 20 of this answer, and these

defendants further say that said voting trust was established as a part of and to more effectually preserve and execute the public charitable trust as set out in subdivision 20 hereof.

25. In answer to the twenty-seventh subdivision of the bill of complaint the defendants deny that the plaintiffs are owners of shares of stock of the Gas Company, but allege that said plaintiffs and all others similarly situated, are holders and owners of trustee's certificates as hereinbefore set out, and are only entitled to the rights and privileges prescribed by said trustee's certificates, and that all the rights of said plaintiffs in and to said stock are subject to the public charitable trust, as is fully set out in subdivision 20 hereof.

These defendants say that they are without knowledge as to the value of plaintiffs' said trustee's certificates, but admit that if said public charitable trust be declared invalid and that the holders of the beneficial interest certificates become entitled to the entire equity in said property, subject to the payment of the Gas Company's preferred stock and other indebtedness, and if the right of the City to acquire said plant and property be defeated, that the said certificates of beneficial interest would be worth more than their present value.

These defendants further say that the plaintiffs, and others in like situation, are only entitled to receive on account of their ownership of said beneficial certificates the sum of \$25.00 per share and interest at the rate of ten percent per annum and no more, and that these defendants are not threatening or intending to do any act which will deprive either of the plaintiffs, or others in like situation, of any such rights.

26. In answer to the twenty-eighth subdivision of the plaintiffs' bill of complaint, these answering defendants admit that the individual defendants acting as officers, Board of Directors and Voting Trustees of the Gas Company, are in sole and exclusive possession and control of the Gas Company and all of its money, property and business, as well as of its corporate organization, and that they are, and for many years have been, transacting all of its business to the total exclusion of these plaintiffs and other holders of beneficial interest in the common stock thereof, so far as any voice in the management of said business is concerned, but these defendants say that said individual defendants have not transacted any of the business of said Gas Company to the exclusion of

any of the rights of the plaintiffs, or any other owners of beneficial interest similarly situated.

These defendants admit that unless finally enjoined by this court said individual defendants will continue to manage the affairs of the Gas Company in accordance with the provisions in said franchise agreement, that are now in effect, and the provisions of the Articles of Incorporation and amendments thereto of said Gas Company, and in accordance with the terms and provisions of said public charitable trust will, unless so enjoined, make the capital payments referred to in the bill of complaint to the holders of the trustee's certificates, and when the face value of said trustee's certificates has been paid to the holders thereof together with ten percent per annum interest thereon, and the preferred stock in said Gas Company has been retired, unless so enjoined by this court, they will transfer to said City said property in accordance with the demands of said City.

These defendants admit that the Voting Trustees have in their possession all of the certificates of stock issued to represent the common stock of said Gas Company, and unless enjoined by this court, said Trustees will assert the right to vote and will vote all of said stock so long as the same is outstanding and unretired, and will vote the same for the purpose of complying with the aforesaid demands of said City, but deny that they have excluded or will exclude the plaintiffs, or any persons similarly situated, from any participation in the affairs of the Gas Company in any particular wherein the plaintiffs, or any persons similarly situated, are entitled to participate, and deny that they will assert the right to vote or will vote any of said stock without regard to the rights or interests of the plaintiffs or others similarly situated.

These defendants say in answer to the allegation that they will assert the right to vote and will vote said stock without regard to the wishes of the plaintiffs, and others similarly situated, that unless otherwise adjudged by this court said trustees intend to vote said stock in accordance with the provisions of said Articles of Incorporation and amendments thereto, and said subscriptions to the stock of said Company and the provisions in the trustee's certificates heretofore referred to and in accordance with the terms and provisions of said public charitable trust as set out in subdivision 20 hereof, and if such purposes are not the wishes of the plaintiffs, then said trustees will

not, unless so enjoined, carry out the wishes of said plaintiffs and others similarly situated.

These defendants say that none of said acts or contemplated acts are in violation of any of the rights of either of the plaintiffs or any other persons similarly situated.

These defendants admit that the City and its officers, defendants herein, are now asserting and, unless restrained and enjoined by this court, will continue to assert the claimed rights of the City to acquire the property of the Gas Company, and to compel the Gas Company to pay for and retire the common stock thereof in accordance with the terms of the franchise of 1905 and the Articles of Incorporation of said Gas Company, but these defendants deny that said City and its officers, defendants herein, are thereby casting, or will continue thereby, to cast a cloud upon the title to and adversely affect the actual value of the interests of the plaintiffs and others similarly situated, in the common stock of said Gas Company, or that any of said acts will result in the irreparable damage to plaintiffs or others similarly situated.

These defendants say that all of the rights claimed and asserted by said City and its said officers are legal and valid, and the assertion thereof will not cause the plaintiffs or others similarly situated any damage, nor entitle the plaintiffs or any others similarly situated to maintain this action.

27. In answer to the twenty-ninth subdivision of the bill of Complaint, these defendants deny that the acts done and claims asserted by the respective defendants herein, as set forth in the bill of complaint, are in derogation of the rights and to the irrevocable injury of the plaintiffs or others similarly situated, for which they have no adequate remedy at law and can have no relief save in a Court of Equity. They deny that the plaintiffs or others similarly situated, would each be required to bring a separate action for damages requiring a multiplicity of suits, and that damages would be difficult to ascertain and assess, for the reason that said acts done and claims asserted are not in derogation of the rights or in violation of the rights or interests of the plaintiffs or others similarly situated, and neither said plaintiffs or others similarly situated, have any cause of action for damages on account thereof.

These defendants deny that there is involved the violation of a trust by the individual defendants acting as officers, Board of Directors and Voting Trustees of the

Gas Company in respect of obligations owed plaintiffs and others similarly situated, and deny that the claims of the City constitute a cloud upon the title to the property of the plaintiffs or others similarly situated.

Wherefore, these answering defendants say that plaintiffs' bill of complaint should, on final hearing, be dismissed for want of equity and that the plaintiffs are not entitled to any relief whatever in the premises.

John W. Holtzman,

Oren S. Hack,

Edward H. Knight,

Smiley N. Chambers,

Pickens, Davidson, Gause, Gilliom & Pickens,

*Attorneys for Said Answering Defendants.*

John W. Holtzman,

Fred C. Gause,

*Of Counsel.*

~~(Entry for June 4, 1939, continued)~~

~~And the defendants Citizens Gas Company et al file answer to bill of complaint which answer is as follows:~~

PLAINTIFF'S EXHIBIT NO. 90.

Mar 2-1939. Paul C. Carpenter, Official Reporter.

New Issue. . . . \$486,000.00

Citizens Gas Company of Indianapolis

10%

Cumulative Capital Stock

Authorized and Issued \$2,000,000.00

Dated July 1st, 1919

Par value \$25.00 per share

Semi-annual dividends payable September 28th, and March 28th, by check from Citizens Gas Company offices at Indianapolis.

Exempt in Indiana from all local and state taxes and free from normal federal income tax.

From the letter of Mr. J. D. Forrest, Secretary and General Manager, which is printed within, we summarize as follows:

The Company has assets in excess of all outstanding securities.

Originators of 60 cent gas, which rate has been maintained throughout the war. Cheapest gas in the world.

Company has complete monopoly in furnishing gas to Indianapolis, a city of over 300,000 people. Has 99 year lease on properties of Indianapolis Gas Company.

Company is owned and managed locally.

Only about 25 per cent of revenues are derived from sale of gas.

Manufacture of coke and by-products chief source of income.

Stock of Company is always sold at public auction to highest bidders, and has commanded premiums totaling \$418,714.90. These premiums are held as special surplus. This issue completes full authorized capitalization.

Contract with Federal Government adjusted and \$519,456.35 paid to the Company June 18th, 1919. This amount has been applied to earnings of Company for years 1919 and 1920.

Net earnings have been sufficient to pay full 10% dividends since 1915 and also to pay up accumulated dividends to full dividend rate for entire history of Company except about \$115,000 which will gradually be distributed out of earnings.

Company has in excess of 2,600 stockholders and of these substantially all reside in Indiana.

Stock is a 10% cumulative investment issued in the form of Trustees' Certificates.

Issuance and sale of this stock approved by Public Service Commission of Indiana.

We offer this stock, par value of shares \$25.00, subject to prior sale and change in price, at \$35.75 per share (or 143) at which price, the dividends being 10%, the stock yields 7%, tax exempt in Indiana and free from normal income tax.

Certificates will be ready for delivery on or after July 1st, 1919.

All legal matters pertaining to this issue approved by Smith, Remster, Hornbrook and Smith of Indianapolis.

Orders may be sent by telephone or telegraph at our expense.

The Union Trust Company  
Bond Department--Chester A. Jewett, Manager  
120 East Market Street  
Indianapolis

Telephones: Main 1576, Auto 26-386



The statements contained herein are not guaranteed, but are based on information which we believe to be reliable and accurate, and upon which we have acted in the purchase of this stock.

Citizens Gas Company of Indianapolis  
Majestic Building  
Office of General Manager

Indianapolis, Ind., June 1, 1919.

The Union Trust Co.,  
Indianapolis, Indiana.

Gentlemen:—

Referring to the purchase of 19,240 shares of the capital stock of this company which you made on May 29th, I beg to give you the following information about the history and present conditions of this company:

#### History.

The Citizens Gas Company of Indianapolis was organized for the purpose of acquiring the disused natural gas system of the Consumers Gas Trust Company, and to furnish the people of Indianapolis with gas at 60 cents per M. Cu. Ft. The former purpose was accomplished October 31st, 1907, and the company began to supply gas on a limited scale in April, 1909. The unusually low price at which the company undertook to sell gas made necessary the use of some process of manufacture which would yield large revenues outside of the gas business proper, for it was impossible to manufacture gas by the ordinary processes in use in the industry and sell it at the price indicated. Accordingly the company undertook to construct and operate by-product coke ovens from which the gas would be a by-product. The operation of these ovens began at the close of the year 1909. The initial coke oven plant was duplicated in the year 1913, and further extensions which have been completed this year have nearly doubled the capacity of the plant as increased in 1913. The by-product coke ovens which were in course of construction by the Indianapolis Gas Company were completed by this company after the property of the former company was leased in 1913, and these ovens have a capacity about 50 per cent. greater than the original ovens constructed by this company.



The expansion of the manufacturing plants of the company and the corresponding expansion of all branches of its business have required large additions to the original investment.

#### Growth of Resources 1910-1918.

The investment of the company in fixed property amounted to \$1,507,801.57 on December 31st, 1910, and by December 31st, 1918, it had increased to \$5,270,379.64, while it had also acquired by lease the important operating properties of the Indianapolis Gas Company. During this same period the company's necessary working capital had expanded from \$153,781.72 to \$1,692,024.40. The present sale of capital stock was made in order to meet in part the recent very great increases in the company's investment in plant and working capital.

#### Revenues.

The gross revenue of the company in the year 1910 was \$525,583.74, while the gross revenue for the year 1918 was \$5,780,838.09. The net revenue after deducting operating expenses and taxes amounted to \$92,013.62 in the former year and \$890,363.42 in the latter. The interest charges in 1910 were \$32,155.00, thus leaving a net profit for the year of \$59,858.62. For the year 1918 the leasehold rental amounted to \$382,936.05 and interest and amortization charges were \$151,151.46, thus leaving a net return of \$356,275.91.

#### Originating 60c Gas.

The price at which the company undertook to supply the people of Indianapolis with gas was at the time the lowest in the United States. In spite of the very great increase in all manufacturing and construction costs this price of 60 cents per M. Cu. Ft. still obtains in this city. Such a price could not be maintained if it were not for the fact that this company is a large operator of by-product coke ovens. The gross income from the sale of gas amounts to rather less than 25 per cent. of the total income of the company. On account of greatly increased costs of production and the rates of gas which have generally been fixed on the basis of a lower price level, the gas companies of the United States have been passing through a very difficult period.

### Government Settlement.

There has already been a revival in the by-product coking business which promises to make the year 1919 a satisfactory one. Heavy investments in manufacturing supplies and heavy increases in fixed charges were made necessary by the war contracts of the company, but these disadvantages will be offset to a considerable extent by the settlement of the company's war claims against the United States Government. The Government has already made payment of \$519,456.35 in settlement of the principal claim. Under the contract which has thus been settled, the receipts from the Government would have been applicable to earnings during the years 1919 and 1920, and the amount received from the Government will therefore be allocated to these two years, thus affording a considerable offset to the shrinkage in the company's business due to the sudden termination of the war.

### Dividend Record.

The company paid its first dividend on January 1st, 1911, and has maintained an unbroken dividend record since that time. Its total disbursements to its stockholders, including the dividend paid in March of this year out of earnings in the year 1918, have amounted to \$1,107,471.98. Under the terms of its Articles of Incorporation and its franchise, the dividends of this company are limited to 10 per cent. on the face value of its outstanding capital stock, but such 10 per cent. dividends are cumulative. The deficiencies in dividend disbursements during the earlier years of the company's business have been made up to December 31, 1911. Other accruals for the period between January 1st, 1912, and June 30th, 1915, will require about \$115,000 for full payment. Since the last named date dividends have been paid at the full rate of 10 per cent. per annum.

### Surplus.

At the close of 1918 the surplus of the company stood as follows

Stock Premium .....	\$253,714.90
First & Refunding Bond Sinking Fund .....	75,786.24
Undistributed Surplus .....	81,209.84
<b>Total .....</b>	<b>\$410,710.98</b>

The paid in surplus designated stock premium will be increased from the recent sale of capital stock by about \$165,000.00.

#### Depreciation Reserves.

It has been the policy of the company to create adequate depreciation and contingent reserves, in addition to charging maintenance costs to current expenses. The depreciation reserves on December 31, 1918, amounted to \$676,688.36, from which certain deductions will be made covering the displacement of certain equipment removed in connection with the recent considerable enlargement of the manufacturing plant. It will be the policy of the company to continue to make appropriations to the depreciation reserve accounts to provide adequate reserves for replacements and obsolescence. Contingent reserves for the settlement of disputed taxes and unforeseen claims amounted, on December 31, 1918, to \$129,463.10.

#### Capitalization and Funded Debt.

The capitalization of the company prior to the recent sale of its capital stock stood as follows:

	Authorized	Issued
First & Refunding Mortgage		
5 Per Cent. Bonds .....	\$10,000,000	\$2,462,000
General Mortgage		
7 Per Cent. Bonds .....	1,500,000	1,400,000
Capital Stock .....	2,000,000	1,500,000

The full authorized capital stock will stand as issued with the delivery of stock sold on May 29th.

The General Mortgage 7 Per Cent. bonds are dated May 1st, 1918, and have been issued to provide funds for the construction of new by-product coke ovens and necessary by-product equipment. These are serial bonds which mature in two to five years. \$650,000 of the First & Refunding Mortgage 5 Per Cent. bonds are pledged as collateral for the General Mortgage bonds and it is the purpose of the company to apply the proceeds from the sale of these bonds to the redemption of the General Mortgage bonds. The remaining bonds of that issue will be redeemed as they mature out of current funds.

**Lessee Indianapolis Gas Company.**

On October 1st, 1913, with the approval of the Public Service Commission of Indiana, this company took over under a 99 year lease all of the operating property of the Indianapolis Gas Company, consisting of a large water gas producing plant, a plant of by-product coke ovens then nearing completion, extensive shops for the distribution department, and the entire distribution system and gas business of the lessor. The manufacturing plants owned and leased by this company have been operated in harmony, and the distribution systems of the two gas companies have been connected and are operated as a single system. The combined systems for the distribution of gas in this city now comprise 621.67 miles of main and the company is now supplying 62,183 gas consumers.

**Voting Trust.**

The capital stock of this company is held in perpetual trust by a board of self-perpetuating trustees. This board votes all of the stock, and of course elects the directors of the company. The original issue of \$1,000,000 of capital stock was sold on popular subscription and was taken by about 3,500 individual subscribers. Under the articles of association subsequent issues of stock have been sold at public auction, the premium going into the surplus account as indicated above. Substantially all of the stock of the company is held by citizens of Indianapolis and almost none of it by persons living outside of the State of Indiana. At present the stockholders number about 2,800. Trustees' certificates are issued to the stockholders by the voting trustees, and these entitle the holders to 10 per cent cumulative dividends. For some years past the company has been paying 5 per cent. semi-annual dividends, and, as indicated above, all of the accruals during the period when full dividends were not paid have now been paid with the exception of about \$115,000. In event of inability to pay the full authorized dividend at any time, the company is pledged to make up the deficiency in the dividend distribution as soon as earnings make this possible.

**Trustees and Officers.**

The voting trustees of the company are Judge Thomas L. Sullivan, President; Thomas H. Spann, Vice-President; Lucius B. Swift, Henry Kahn and G. A. Schnull. The directors of the company are John R. Welch, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; G. A. Efroymsen, Treasurer; H. W. Bennett, J. H. Hooker, H. H. Hornbrook, Robert Lieber and Franklin Vonnegut.

I am attaching hereto profit and loss statement for the year 1918 and balance sheet as of December 31, 1918.

Very respectfully yours,

(Signed) J. D. Forrest,  
*Secretary and General Manager.*

•        •        •        •        •  
 ("Here follows revenue statement of Citizens Gas Company for year ending December 31, 1918, and balance sheet as of same date.")

(Inserted pursuant to stipulation filed November 22, 1939.)

**PLAINTIFFS' EXHIBIT 91.****Office of Citizens Gas Company**

Indianapolis, Ind., June 7, 1913.

To the Stockholders of the Citizens Gas Company:

Your Company is again being subjected to attacks similar to many others which have been made since it was organized by you for the purpose of serving this community. As on many occasions in the past, your Company again calls on you to use your influence in meeting these attacks and in advancing the interests of your Company. The Management of this Company has never yet made a promise which it has failed to fulfill; and no line of policy has ever yet been adopted by this Company which has not worked to the interest of both stockholders and the public. The same Directors and the same Trustees continue in control of this Company, and we believe that the record made in the past by them in serving your interests and the interests of the public justify them in appealing to you for continued confidence

in their integrity and in their ability to conduct the affairs of this Company.

**Petition to Public Service Commission.**

On May 21st your Company submitted to the Public Service Commission of the State of Indiana a petition asking approval of a proposed lease of the entire gas property of the Indianapolis Gas Company, and submitted therewith both the draft of lease and a statement giving detailed reasons for believing that the lease was in the interest of this Company and of the public as well as reports and estimates showing the advantages to this Company, and ultimately to the consumer, from control of the property of the Indianapolis Gas Company under the terms of the lease. All of these papers are public documents, accessible to all citizens who are interested in ascertaining their contents, and extensive quotations from them have been made in the public papers. Further, the Management of the Company has been prepared to furnish inquiring stockholders any other information in its possession. There would therefore seem to be no justification for ignorant attacks on the Company; yet none of those who have made such attacks either in public or in private seem to have paid any attention to facts already made public or any desire to obtain further information. In brief, the statement filed with the Commission set forth the following information:—

**Competition Dangerous to the Company and the Community.**

Although the Citizens Gas Company has been able to compete successfully with its larger rival, and will continue to do so if necessary, this competition has not been without dangers in the past, and may be found to be more dangerous in the future. The old management of the Indianapolis Gas Company was bent on bringing the Citizens Gas Company into bankruptcy. It had much larger financial resources than the Citizens Company and had the approval of the immensely powerful interests which control many other gas companies in the United States. The old company has at last followed the lead of your Company by constructing By-Product Coke Ovens and it was the avowed intention of the old management



of that company to begin immediately such character of competition as was best calculated to destroy the Citizens Company. The far greater volume of business which the old company has always had would enable it to spend far more money in gaining and holding business than the Citizens Company could possibly afford, and when the cost of manufacturing gas could be reduced, it would be possible to injure this Company in many ways not previously attempted.

The Citizens Gas Company has had ample capital for its necessary work, but not for rapid extension or enlargements to outstrip its competitor. Under any competition which would prevent the Citizens Company from paying dividends, it would be difficult for the latter company to sell additional stock or bonds with which to keep itself abreast of the requirements of its business. Therefore, although an unreasonable cut in the price of gas would certainly cause great injury to the Indianapolis Gas Company, the greater size of that company and the greater resources of its New York owners would have enabled it to stand the strain far better than the Citizens Gas Company could do, and the latter might have become discredited and weakened beyond repair.

At the suggestion of the Citizens Gas Company certain citizens of Indianapolis acquired control of the Indianapolis Gas Company at a cost of nearly \$2,000,000. This was done under an agreement in advance that the old plant and mains would be leased to your Company, which should then operate the entire system under your Franchise. This purchase was made in good faith, and these gentlemen stand ready to fulfill their part of the contract, if permitted to do so by the Public Service Commission. However, although the present owners of the Indianapolis Gas Company are friends of the Citizens Gas Company, if the lease does not become effective, they are bound to operate their property to their own best advantage. They would be obliged to carry on such competition as would best advance the interests of their company, and after establishing a record of large dividends for a year or two, they would probably sell the control to other large gas interests which would not be friendly to this Company and which would probably have larger resources than those of the previous owners. Thus the dangers of competition will not be removed unless the lease becomes effective, even although the control of

the old company may continue temporarily in the hands of friends of your Company.

**Competition Wasteful to the Company and the Community.**

It has never been disputed that a single gas company can be more efficiently operated than two in the same community, and where the single gas company is regulated by a franchise which safely guards the interests of the community, as yours does, or where it is operated under the regulation of a conscientious Public Service Commission, there is only loss to the community from a duplication of the service. Although the two gas companies in this city have generally made extensions in such a way as not to duplicate each other, there have been many duplications of mains; sometimes in the scramble to get into desirable territory, sometimes through ignorance of each other's plans which caused both companies to begin laying mains simultaneously in the same streets, sometimes because one company must put in new mains to improve its circulation, whereas the other company had already an adequate main in the same street. During the season of 1912 the Indianapolis Gas Company laid 28,000 feet of mains 8 inches or more in diameter at a cost of over \$27,000. The greater part of these extensions was for the sake of strengthening the system and not for the purpose of taking care of new consumers. Now the Citizens Gas Company had adequate large mains in nearly all of these streets which could have served this purpose fully as well as the new mains just laid, if it had been possible for the two companies to operate as one. Such wastes of investment mean that ultimately the community must pay interest and dividends on such duplications. Similarly, thousands of new gas services have been laid to connect given houses, whereas those houses were already connected with the mains of the opposing company; yet it would be impossible to avoid these duplicate services if each company should continue to try to get and hold all business possible.

The Indianapolis Gas Company was subjected to an expense of about \$22,000 per year for the maintenance of a New York office and the payment of salaries to New York officials. This was a waste of absentee ownership which the present owners can cut off regardless of any

amalgamation. In addition thereto we estimate that the amount of \$58,941 can be saved in the operating expenses of the Indianapolis Gas Company by reduction of duplication of work and other wasteful expenses caused by competition. At the same time, it is estimated that \$19,050 can be saved in the operation of the Citizens Gas Company by cutting off the duplication of service. These figures are based on the operating expenses of the two companies in 1912, and the savings must correspondingly increase as the volume of business becomes greater. It thus appears that by cutting off the New York office and eliminating certain known wastes of competition, there may be effected a saving of \$99,991 per year in the operation of the gas business in this city. All of these economies, together with the saving in reduced capital charges on account of stoppage of duplicate construction, inure immediately to the benefit of the Stockholders of the Citizens Gas Company and ultimately, under your Franchise, to the benefit of the community generally.

#### Profits to the Citizens Gas Company.

Your Directors have ever felt that they were serving this community best by conducting your business in a businesslike manner and securing for you the return on your investment which your Franchise authorized, and which you had a reason to expect because of the subscriptions to the stock of this Company which made 60-cent gas possible in Indianapolis. They have therefore carefully considered the interests of the Stockholders of the Citizens Gas Company under the operation of the proposed lease, and they have concluded that there will be a large profit therefrom which will enable your Company more quickly to reach the maximum dividend authorized and to pay off the accrued back dividends authorized, and to reduce the price of gas still further in this community.

In addition to the saving of \$80,941 in the operation of the Indianapolis Gas Company, as explained above, your Company would receive from the Indianapolis Company all other net profits after payment of rent. The net profits of that company in 1912 amounted to over \$90,000. The company sold over 1,300,000,000 cubic feet of gas. The new plant now nearing completion will reduce the cost of gas in the holder from 22 cents to 10 or 11 cents, meaning a saving on last year's volume of business of about \$150,-

000. This would make a total net profit for the Indianapolis Gas Company of \$320,000, from which a rental of \$140,000 would be deducted, leaving a net profit to your Company of \$180,000 from the lease on the basis of last year's business. This is a conservative estimate since the gas sales of the Indianapolis Gas Company have been increasing annually at the rate of about 12½ per cent., so that the sales from the Indianapolis lines for the year 1914 will amount to about 1,700,000,000 cubic feet instead of 1,300,000,000 cubic feet as here given. But this conservative estimate is made still more conservative in the following statement, which has been presented to the Public Service Commission:

Estimate of Profits to Citizens Gas Company from Joint Operation of Citizens and Indianapolis Properties, Assuming No Increase in Business Over That of 1912 and Assuming a Saving in Manufacturing Costs of the Indianapolis Plant of Only 8.27 Cents.

Net earnings Indianapolis Gas Company, 1912.	\$299,507.69
Savings on 1,329,179,000 cubic feet gas @ 8.27 cents .....	109,923.18
Saving from cutting off New York office.....	22,000.00
Saving from eliminating wastes .....	58,941.00
Net earnings on same volume of business.....	\$490,371.87
Interest on \$4,833,000 bonds @ 5% .....	241,650.00
Net profits .....	\$248,721.87
Rent .....	140,000.00
Net gain to Citizens Gas Company....	\$108,721.87
Add net earnings Citizens Gas Company, 1912.	167,512.65
Add elimination of waste by Citizens Gas Company .....	19,050.00
Total Net Earnings for Citizens Gas Company .....	\$295,284.52
Interest on \$1,020,000 Citizens Bonds .....	51,000.00

Total Net Profits of Citizens Gas Company. \$244,284.52

Note—The profits to the Citizens Gas Company from operating the Indianapolis property as shown above would be equal to over 8½% on \$1,250,000 of stock; and the com-

bined profits, after all fixed charges, would be equal to over 19% on the Citizens stock.

In view of the fact that the business of both companies is increasing rapidly and that your Company will reap material benefits from the completion of its new By-Product Coke Ovens, as well as from the operation of the property of the Indianapolis Gas Company, it is more reasonable to assume that the net profits to the Citizens Company for the calendar year 1914, after paying all bond interest and the rental of the Indianapolis property, would amount to \$318,944. This estimate has been carefully worked out with the assumption that the total gas sales of the two companies in that year will amount to 2,214,273,000 cubic feet and that the gas will be sold at an average of 53 cents per thousand, and it is still estimated that the saving in manufacturing cost at the Indianapolis plant will be 8½ cents instead of 10 or 11 cents, as seems probable. This estimate also provides for some slight increase in bond interest for bonds sold to pay for gas main extensions.

For the year 1915, it is our belief, based on careful estimates, that the net profits to your Company, after paying all interest and rental charges, would amount to \$326,323; and it is assumed, in our estimates, that the gas sales for that year will amount to 2,435,700,000 cubic feet and that the price of gas will average 50 cents per thousand cubic feet.

It will be observed that even on the most conservative of these estimates, your Company would be amply justified in renting and operating the other property, for the large surplus over dividend requirements would be ample to provide for unforeseen contingencies or for such reserves as might be considered wise by your Directors or required by the Public Service Commission. It is the belief of your Directors that the business will continue to show increasing earnings from year to year in the face of a continuance of our policy of reducing the price of gas for the benefit of the whole community. Your Company, after taking over the other property, would start with 51,000 consumers.

#### Profits to the Community.

Your Directors and Trustees have never lost sight of the purpose for which your Company was organized, namely the reduction in the price of gas, and it is their

desire that this reduction from the present unparalleled low price of 60 cents may be made as rapidly as possible. But aside from the desires of the Management of your Company, its organization is such that any improvement in its earning capacity must work to the benefit of the community, for the Directors must either reduce the price of gas and thus continue the corporation's existence, or they must apply surplus earnings to the return of the principal of your investment, after which the property would pass by law to the ownership of the City of Indianapolis. It therefore follows that the showing of profits which is made above, while immediately indicating advantage to the Stockholders of this Company, must ultimately work to the advantage of the entire community. It will be the policy of your Directors to absorb these profits by reducing the price of gas rather than by extinguishing your stock, for it is believed that this policy would meet the wishes of this community.

#### Terms of the Proposed Lease.

It was agreed by your Company, before Indianapolis capital purchased the control of the Indianapolis Gas Company, that if such control should be acquired your Company would lease the property, subject to approval of the Public Service Commission, at a rental at the rate of \$60,000 for the last half of 1913 and of \$140,000 per year thereafter, with the further provision that after the dividends of the Citizens Company shall reach 8%, the rental shall advance to \$160,000, but in the event that the Citizens Company should not earn 8% in any year, the rental should drop back to \$140,000. In addition to the payment of such rental, the Citizens Gas Company would take care of the interest on the outstanding bonds of the Indianapolis Gas Company, amounting to \$4,833,900. While it was and is the desire of your Directors to obtain this property on the lowest rental possible, it was only on these terms that the investors could be induced to purchase the control of the Indianapolis Gas Company. The advantages to your Company from this lease are so great, as shown in the foregoing statements, that your Directors consider your Company easily justified in paying the rental agreed upon, although they would be glad to save at that point as at any other.

While the reproduction value of the property and busi-



ness connections of the Indianapolis Gas Company is not a matter of prime importance in considering this lease, since the earning value of the lease to your Company is so clearly established, your Company has a safe knowledge of the physical property which it is proposed to lease, and considers it an extremely valuable addition to the physical property controlled by you. The Indianapolis Gas Company has over 375 miles of mains, mostly under paved streets, some 50,000 services, likewise largely under paved streets, and over 40,000 meters now in use. In addition to the distributing system the Indianapolis Company has a large manufacturing plant to which it is now adding By-Product Coke Ovens of modern type, to be paid for by the present owners. The very large Water Gas Plant of the old company is in perfect condition and will be permanently valuable for the purpose of giving elasticity to the manufacturing departments of the two companies, thus removing many of the dangers from emergencies which have confronted your Company with its much smaller Water Gas Plant. The By-Product Coke Ovens, the By-Product Recovery Plant and the Coal and Coke Handling Equipment, will be of the most modern type and will be entirely new when they come into the possession of your Company. The old Coal Gas Manufacturing Plant will not itself be operated, but the Purifier Plants, the Power Plants and the Compressor Plants of the company will be in perfect condition when turned over to your Company. In addition to the foregoing, the Indianapolis Company owns large new Shops, Stables and Warehouses on West Pratt Street, together with equipment and stores, all of which will come to this Company. By tying together the two systems of mains, a much more perfect distribution of gas can be obtained than has ever been possible heretofore, and the complete connection of the two manufacturing plants, located on opposite sides of the city would seem to remove forever the possibility of cutting off the city's supply under any emergencies whatever.

While it is undoubtedly true that the capitalization of the Indianapolis Gas Company was greatly inflated at the time of its reorganization twenty-three-years ago, it must be remembered that the company has distributed no dividends since one amounting to 2 per cent. in the year 1900, and that prior to that time the dividends had been small for several years. Since that reorganization, all of the earnings of the company have been put back into the

property and over 200 miles of mains have been laid, in addition to many other improvements. During that period no new bonds have been issued except to cover 90 per cent. of the actual cost of improvements on which the proceeds have been used, so that any bond discount allowed during that period has been paid out of earnings. Therefore, taking into consideration the present condition of the physical property, the large going-value represented by over 40,000 meters, and the fact that large earnings during a great many years were put back into the property, your Company does not regard the interest and rental charges assumed by it as excessive from the valuation point alone; but, as stated above, the main consideration at the present time is what the property can earn for the Stockholders of the Citizens Gas Company with gas selling at 60 cents or less.

It has been publicly stated that the present owners of the Indianapolis Gas Company acquired control in the interest of the Citizens Gas Company and were obliged to tie up nearly \$2,000,000 in the purchase of stock, which in no case cost them less than 90 and in some cases more than par, and also to meet their obligation to complete payments on the new plant which is being constructed by their company. While the rent which it is proposed to pay will make their investment a good one, it must be said in justice to these gentlemen that they will reap no large speculative profits from the transaction. It must be remembered that your Company was not legally qualified to purchase this stock at the only time when it could be secured; and that if it had been legally possible to purchase the stock, your Company could not finance the transaction by the sale of its own stock and bonds, during the present period of tight money, without causing a tremendous fall in the values of both classes of securities. While, therefore, your Directors and Trustees would have been glad to obtain this property at lower charges, the rental is not considered excessive, in view both of the investment and risk of the present owners of the property, and of the very great advantages to you and to the community. The property was secured by a syndicate headed by Mr. Volney T. Malott, of the Indiana National Bank, and consisting of some six gentlemen, none of whom are Directors or Trustees of your Company. Although the stock of the Indianapolis Gas Company had a nominal quotation on the Indianapolis Exchange much lower than the price paid by this syndicate, there were no sales at the quoted prices;

and you can readily understand that the purchase of not less than 30,000 shares of stock held by a few owners, none of whom were residents of Indianapolis, as was necessary in this case, could not be made on the basis of quotations for a few shares. The syndicate, in order to reap any benefit from its investment, must continue to hold the stock for a considerable period; and at the present time there are few groups of capitalists in this or any other community, that could be formed for the purpose of tying up so large an amount of money.

While the ownership of over three-fourths of the stock of the Indianapolis Gas Company will thus be held by about six persons, the absolute control of that property under the lease would be vested in your Company, which now represents 3,000 stockholders. Out of this number only one person holds as much as \$25,000 of your stock. That amount is held by the broker who purchased \$200,000 of it in January, and represents his entire holdings at the present time. Three persons hold between \$20,000 and \$25,000 of your stock. Fourteen persons held between \$10,000 and \$20,000 of your stock. Thirty-four persons hold from \$5,000 to \$10,000 of your stock. All of the balance is in the possession of persons whose respective individual holdings are under \$5,000 each. It thus appears that both the control and the larger share of the profits from the Indianapolis Gas Company will be vested in this popular Company, under the Trusteeship established in your Franchise.

Respectfully submitted,  
Citizens Gas Company of Indianapolis.

J. D. Forrest,

*Secretary and General Manager.*

Voting Trustees: Thomas L. Sullivan, President; Thomas H. Spann, Vice-President; Lucius B. Swift; Henry Kahn; Gustav A. Schnull.

Directors: Franklin Vonnegut, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; Lorenz Schmidt, Treasurer; F. M. Bachman; J. H. Hooker; Robert Lieber; W. J. Mooney; John R. Welch.

General Office--31-35 South Pennsylvania Street, Indianapolis, Indiana.

**PLAINTIFF'S EXHIBIT NO. 92.**

**Report of the Citizens Gas Company of Indianapolis  
Six Months Ending June 30, 1913**

To the Stockholders of the Citizens Gas Company:

The Company presents herewith its report for the first half of the year 1913. The Spencer-Shively Public Utilities Act having fixed June 30th as the close of the fiscal year for all public utility corporations in the State of Indiana, the fiscal year of this Company hereafter will date from July 1st instead of January 1st.

**Relations With Indianapolis Gas Company.**

As you have been advised, your Company on February 27, 1913, after careful investigation and negotiations, entered into a contract with a syndicate organized by Mr. V. T. Malott, for the lease of all of the operating property and business of The Indianapolis Gas Company, over three-quarters of the stock of which the syndicate had acquired. After careful study of the business of The Indianapolis Gas Company, your Directors and Trustees were convinced that there would be large surplus profits for the Citizens Gas Company from the operation of the property of The Indianapolis Gas Company under the proposed lease, thus making possible not only the earlier payment of accumulated dividends to which you are entitled, but also bringing nearer the day when a further reduction in the price of gas could be made. It was further believed that by acquiring permanent control of the opposition company, the position of the Citizens Gas Company and the perpetuation of cheap gas in Indianapolis could be assured as in no other way. A petition for the approval of said lease was submitted to the Public Service Commission, after the organization of the same. This matter is still pending before the Public Service Commission which has indicated that certain conditions would have to be met before the lease would be approved. The owners of The Indianapolis Gas Company have consented to a reduction of rental below that to which they would agree prior to the purchase of the stock of that Company by them, thus making the lease still more desirable from the point of view of this Company. It is hoped that the negotiations between the Commission and your Company will result in the ap-

proval of the lease, which is believed by your Directors and Trustees to be very favorable for you and the gas consumers of Indianapolis. Opponents of the proposed lease have made many criticisms based on partial or false information, but the prolonged consideration of the subject has only tended to convince your Directors of the advantages which the lease would secure for all of the interests for which the Citizens Gas Company has always stood.

Meanwhile competition between the two companies continues with much attendant waste to both and considerable hampering of the development of your Company; but many of the more unreasonable elements of competition were eliminated when the competing company passed into the hands of friends of the Citizens Gas Company. One of the first effects of the change of ownership was seen at the time of the floods which inundated the plant of The Indianapolis Gas Company and completely stopped operations there. The Citizens Gas Company immediately made a connection with the mains of The Indianapolis Gas Company and from March 25th to 28th sent to that Company 6,431,000 cubic feet of gas, supplying the entire amount consumed by the citizens of Indianapolis on some of the days named. Had The Indianapolis Gas Company been in the hands of its former owners, they would rather have had their consumers deprived of gas, thus vastly increasing the suffering caused by the flood, than to have accepted gas from the Citizens Gas Company, thus acknowledging obligation to your Company and recognizing its ability to supply the entire city. Since that time and pending the completion of the by-product coke ovens of The Indianapolis Gas Company, your Company has been supplying it with a large amount of gas. Permanent connections have been made between the lines of the respective companies, thus safeguarding the city in the event of an emergency at the plant of either. Your Company has never yet received gas from the other Company, but in the past there have been many occasions when there would have been large economies from the purchase of gas from it instead of operating your water gas plant, and at times there would likewise have been a complete avoidance of danger to your Company.

Respectfully submitted,

By Order of the Board of Directors,

J. D. Forrest,

*Secretary and General  
Manager.*

Indianapolis, August 20, 1913.

Voting Trustees: Thomas L. Sullivan, President, Thomas H. Spann, Vice-President; Lucius B. Swift; Henry Kahn; Gustav A. Schnull.

Directors: Franklin Vonnegut, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; Lorenz Schmidt, Treasurer; F. M. Bachman; J. H. Hooker, Robert Lieber; W. J. Mooney; John R. Welch.

General Office—31-35 South Pennsylvania Street, Indianapolis, Indiana.

### PLAINTIFF'S EXHIBIT NO. 93.

Report of the Citizens Gas Company of Indianapolis  
Year Ending December 31, 1913.

To the Stockholders of the Citizens Gas Company:

The Company presents herewith its report for the year 1913, showing the results of operation for the entire year and also the report of receipts and disbursements for the two half year periods as required by the franchise.

### Manufacturing Plants.

On October 1, 1913, your Company took over the operating property and business of The Indianapolis Gas Company. The operations for the year therefore include three months' operation of the Langsdale Avenue manufacturing plant and the entire Distribution System which had formerly been controlled by The Indianapolis Gas Company. Twenty-five of the new coke ovens at the Prospect Street plant were put into operation in June and the remaining 25 near the end of October. The operation of the Prospect St. Plant until very near the end of the year was considerably hampered by construction work which was in progress, and was therefore accompanied by unusual expenses at many times. That construction work was not entirely completed until after the close of the year. The new by-product coke ovens at the Langsdale Avenue Plant were at an advanced stage at the time the plant was taken over from The Indianapolis Gas Company, but the plant could not be put into operation at all until February 13th of this year, when a few of the ovens were first charged. At that date the old coal gas retorts were abandoned, and the work of dismantling began, in order to



make room in the same buildings for auxiliary equipment for the new coke oven plant. The completion of this last part of the new construction at the Langsdale Avenue Plant was necessarily delayed in order to keep the coal gas retorts in operation until the ovens could be started. The construction work at both plants was very greatly delayed by inability to secure prompt deliveries of material and equipment. However, all of these difficulties are now in the past, and your Company is in possession of two manufacturing plants which, both singly and in combination, probably constitute the finest gas producing equipment in the United States. The by-product coke ovens at the Prospect St. Plant have a producing capacity in excess of 3,500,000 cubic feet of gas per day. Those at the Langsdale Avenue Plant, when the auxiliary equipment shall be completed and the coke ovens can be heated by producer gas instead of by oven gas, will have a producing capacity in excess of 5,000,000 cubic feet of gas per day. The Water Gas Plant at Prospect Street has a capacity of about 2,000,000 cubic feet of gas per day. That at Langsdale Avenue has a capacity close to 6,000,000 cubic feet per day. As you have been advised heretofore, it is not practicable to manufacture water gas and sell it at the low price established by your Company in this city, but these water gas plants are of very great importance to the City of Indianapolis to provide for emergencies in the operation of the by-product coke ovens, possibly to increase the heat value of the Langsdale oven gas, and to supplement the latter when the peak loads of consumption rise above their capacity and before the average consumption of the city has reached a point where additional coke ovens can be constructed. The provision for heating the Langsdale ovens with producer gas will enable that plant, when operating conditions require, to send all of its oven gas into the city, while the provision for heating the ovens with their own gas will enable your Company to operate them more economically when the demand for gas does not necessitate the operation of the producers. While gas can be produced at your Prospect plant at a lower cost per thousand cubic feet in the holder, that plant has little elasticity except by the manufacture of water gas which is enormously expensive. The new coke ovens at your Langsdale plant provide an element of elasticity of very great advantage both for economical operation and in facility for rendering the city the service

which it requires; while the complete water gas plant at Langsdale Avenue affords a still greater element of elasticity for meeting emergencies and for producing an adequate supply of gas when the coke ovens of both plants would otherwise be over-taxed. No other gas company in the United States enjoys the advantages for economy and certain gas production that are furnished by these two plants when operated in combination.

### Distribution System.

At the close of the year 1912 your Company had in use 174.96 miles of mains. The system of The Indianapolis Gas Company was appraised as of July 1, 1913 had a total of 376.34 miles. The Indianapolis Gas Company between July 1st and October 1st had laid 6.81 miles of additional mains. The total extensions made by your Company to its own system amounted to 9.56 miles during the year 1913, and its extensions to the system of The Indianapolis Gas Company between October 1st and December 31st amounted to 4.19 miles. Therefore the total distribution system operated by your Company at the close of the year amounted to 571.86 miles.

Immediately after taking charge of the leased property we made several emergency connections between the two systems, whereby gas could be transferred quickly from one to the other. These connections have been very useful and have enabled us to improve the service materially in the eastern and southwestern sections of the city. The engineers of the Company have worked out a comprehensive plan for tying the two systems together, so that they may be made substantially a common system. This work will be carried on as rapidly as possible, and when completed will give the gas consumers of the city the most uniform possible gas pressure. In addition to improving the service, the complete combination of the two systems will result in substantial economies by reducing the very heavy pumping expenses which have heretofore been necessary at the Langsdale Avenue Plant, and by enabling the two manufacturing plants to work in more complete unison for the supply of the city's requirements.

Your Company had in use on December 31, 1912, 10,698 meters. On September 30, 1913, this number had increased to 11,165, and The Indianapolis Gas Company had in use on that 41,541 meters. The total number in use at the end of the year was 52,738.

Lease of the Indianapolis Gas Company.

On September 30, 1913, the Public Service Commission of Indiana approved a contract of lease between your Company and The Indianapolis Gas Company, whereby all of the property and business of the latter passed under the control of your Company for a period of ninety-nine years. Under the terms of the lease your Company pays as rental the interest on the bonds of The Indianapolis Gas Company outstanding at the time of the lease, which amounted to \$4,833,000; and any additional bonds of The Indianapolis Gas Company which your Company may use for the purpose of extensions and betterments to the property of The Indianapolis Gas Company will likewise be guaranteed as to interest charges by your Company. Your Company also pays an annual rental of \$120,000 so long as the price of gas to the general consumers in the city shall be not less than 55 cents per thousand cubic feet. If the price shall be reduced to 50 cents per thousand cubic feet, the rental will be increased to \$130,000, and if the price of gas shall be reduced to 45 cents per thousand cubic feet, the annual rental shall be \$135,000. In addition to all of the property of The Indianapolis Gas Company at the date when the lease became effective, that Company was required by the lease to expend, without increase of bonded indebtedness, a total of \$600,000 on the construction of the by-product coke ovens which was then in progress at the Langsdale Avenue Plant.

By this merger your Company has established on a much firmer basis the very low price of gas which it introduced in this city, and makes possible the introduction of very great economies in carrying on the gas business of this community. Your Company has been strengthened in every way, and its financial position has been rendered much more secure by the removal of conditions which made it impossible to obtain capital outside of the City of Indianapolis. The profits to your Company from this merger cannot begin to be very great until after the middle of the year 1914, because it will be necessary to operate the water gas plant of The Indianapolis Gas Company on a large scale up to about the first of April. However, it was possible to begin certain important economies soon after the merger became effective, and these have already resulted in some net increase in your

Company's profits, after payment of all rental charges as well as your own bond interest. The net profits of your Company, after meeting all such fixed charges, amounted to \$37,865.96 for the first quarter of combined operation, ending December 31, 1913. These figures compare with net profits of \$35,775.22 for the quarter ending September 30, 1913, and with \$31,652.78 for the last quarter of the year 1912. The gain in net profits for the first quarter of 1914 will be considerably larger than that for the last quarter of 1913. However, the full advantages of the merger in this direction will not be felt until a reasonable time has elapsed after putting the new and modern manufacturing plant into operation.

Respectfully submitted,

By Order of the Board of Directors,

J. D. Forrest,

*Secretary and General Manager.*

Indianapolis, March 28, 1914.

Voting Trustees: Thomas L. Sullivan, President; Thomas H. Spann, Vice-President; Lucius B. Swift; Henry Kahn; Gustav A. Schnull.

Directors: Franklin Vonnegut, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; Lorenz Schmidt, Treasurer; F. M. Bachman; J. H. Hooker; Robert Lieber; W. J. Mooney; John R. Welch.

General Office—Majestic Building, Indianapolis, Indiana.

#### PLAINTIFFS' EXHIBIT 94.

Report of the Citizens Gas Company of Indianapolis  
Six Months Ending June 30, 1914

To the Stockholders of the Citizens Gas Company:

The Company presents herewith its report for the first half of the year 1914.

#### Operation Under Merger.

During the entire period covered by this report, your Company was operating the plant and system of The Indianapolis Gas Company, which was taken over under lease, October 1, 1914. However, it was necessary to

operate the water gas and old coal gas plants for nearly two months of the period, because delays in obtaining delivery of materials held back the completion of the new coke ovens. Since the latter have been in operation they have been giving as good results as were anticipated.

When it is considered that the Company's estimates for 1914 were based on 60 cent gas and average business conditions and that a reduction in income amounting to \$52,819.25 was brought about by the reduction in the price of gas, and that the business depression has resulted in a much lower price for coke than the Company has ever been obliged to take in the past, the operation of your Company under the merger appears fully to justify all that was anticipated at the time the estimates were made.

Since the changed conditions, with minor exceptions, could no more have been taken into account than the present European war, it may be claimed for your Company that it has, thus far, fulfilled its promises of a year ago. In addition, it has avoided by means of this merger, the immeasurable disadvantages of a gas and coke war with its competitor after the completion of the new coke ovens. *Most of the unfavorable conditions indicated above would have worked much greater disadvantage to the Citizens Gas Company in competition with The Indianapolis Gas Company than they have done to your Company in control of the entire field.*

Respectfully submitted,

By Order of the Board of Directors,  
J. D. Forrest,

*Secretary and General Manager.*

Indianapolis, September 23, 1914.

Voting Trustees: Thomas L. Sullivan, President; Thomas H. Spann, Vice-President; Lucius B. Swift, Henry Kahn, Gustav A. Schnull.

Directors: Franklin Vonnegut, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; Lorenz Schmidt, Treasurer; F. M. Bachman, J. H. Hooker, Robert Lieber, W. J. Mooney, John R. Welch.

General Office: Majestic Building, Indianapolis, Indiana.

PLAINTIFFS' EXHIBIT 95-A.

Poor's Manual of Public Utilities.

857

Citizens Gas Co. of Indianapolis.—Incorporated under Indiana laws, May 23, 1906, and in October, 1907, acquired the distribution system formerly owned by the Consumers Gas Trust Co., a natural gas company which had been placed in liquidation by order of the Courts. The company immediately constructed a water gas plant with a capacity of about 2,000,000 cubic feet of gas daily, which was placed in operation in April, 1909. It also constructed fifty by-product coke ovens, which were first put into commission in November, 1909. It has since constructed fifty additional coke ovens of the same type. On October 1, 1913, the company acquired by 99-year lease the plant and distributing system of the Indianapolis Gas Co., which company had a well equipped water gas plant having a capacity of over 4,000,000 cubic feet of gas per day, and had undertaken the construction of by-product coke ovens for its regular supply of gas. The Citizens Gas Co. completed the ovens and put them into commission about the middle of February, 1914. Under ordinary conditions the entire supply of gas for the city of Indianapolis is derived from the by-product coke-ovens, the water gas plants being operated only in times of emergency, or when there is a sudden increase in the demand for gas. Both the owned and the leased plants are operated regularly, and the entire business is conducted as a unit. The total owned and leased distribution system consists of 587.40 miles, and the company has over 53,000 meters in use. The population served is about 275,000, and this company conducts the entire gas business for the city and suburbs.

Poor's Manual of Public Utilities.

859

Company Leased by Citizens Gas Co. of Indianapolis.  
Indianapolis Gas Co. (The).—Incorporated in 1890, under the laws of Indiana, as a consolidation of the Electric Lighting, Gas Heating and Illuminating Co., the Indianapolis Gas, Light and Coke Co. and the Indianapolis



Natural Gas Co. Owns a complete water gas plant having a capacity of 6,000,000 cu. ft. per day, and a by-product coke oven plant, capacity 5,000,000 cu. ft. of gas per day. The latter, which was completed by the lessor, was put into commission in February, 1914. Franchises are perpetual. Miles of mains, 399.18 of which 16.93 miles were added by the lessor.

Lease.—Leased on October 1, 1913, for 99 years, to Citizens' Gas Co.

Capital Stock.—Authorized and outstanding, \$2,000,000. Shares, \$50. Of the total stock, 34,453 shares of a par value of \$1,722,650, are held by the trustee for the "Home Association of Stockholders of the Indianapolis Gas Co. Registrar, The Union Trust Co., Indianapolis, Ind. Transfer office, 1004 Majestic Building, Indianapolis, Ind. Annual meeting, second Tuesday in February, at Indianapolis, Ind. Books close 10 days before and re-open one day after.

Dividends.—Dividends guaranteed by Citizens Gas Co. of Indianapolis, under 99-year lease, dated September 30, 1913, at present rate of 6% payable January and July. Dividends payable by lessee to be increased to 6½%, if the price of gas is reduced to 50 cents per 1,000 cubic feet, and to 6¾ p. c. if the price is reduced to 45 cents. Dividends checks are mailed by Citizens Gas Co. Books close twenty days before and reopen one day after dividend payments. Stock likewise entitled to dividends from profits or liquidation of unleased property of the Indianapolis Gas Co., as and when declared by the directors of that Company.

Funded Debt.—Outstanding December 31, 1914, \$5,052,000 first consolidated mortgage 5 p. c. 50-year gold bonds; due October 1, 1952; interest April 1 and October 1, at office of trustee, Equitable Trust Co., New York, N. Y. Coupon bonds, \$1,000. Authorized, \$7,500,000; the remainder of bonds being reserved for 90 p. c. of cost of betterments actually made. Co-trustee, Ferdinand Winter, Indianapolis, Ind. A first lien on all property owned by the Indianapolis Gas Co. and leased to the Citizens Gas Co., but not a lien on unleased property of the former company. Citizens Gas Co. has \$163,000 bonds in its treasury for betterments made to leased property prior to December 31, 1914. Bonds may be registered upon the books of the Central Trust Co. of New York. Interest and refunding of bonds at maturity guaranteed by Citizens

Gas Co. under the lease of September 30, 1913. Listed on New York Stock Exchange.

## PLAINTIFFS' EXHIBIT 96-A.

2310

## Public Utilities

Citizens Gas Co. of Indianapolis.—Inc. May 23, 1906, in Ind. and on Oct. 31, 1907, acquired the distributing system and property formerly owned by the Consumers Gas Trust Co., a natural gas company which had been placed in liquidation by order of the courts. The Company immediately constructed a water gas plant with a capacity of about 2,000,000 cu. ft. of gas per day, which was placed in operation in April, 1909. It also constructed 50 by-product coke ovens, which were first put into commission in Nov., 1909. It has since constructed 50 additional coke ovens of the same type. On Oct. 1, 1913, the company acquired by 99-year lease the plant and distribution system of the Indianapolis Gas Co., which company had a well-equipped water gas plant having a capacity of over 4,000,000 cu. ft. of gas per day, and had undertaken the construction of by-product coke ovens for its regular supply of gas. The Citizens Gas Co. completed the ovens and put them into commission about the middle of Feb., 1914. Under ordinary conditions the entire supply of gas for the city of Indianapolis is derived from the by-product coke ovens, the water gas plants being operated only in times of emergency, or when there is a sudden increase in the demand for gas. Both the owned and the leased plants are operated regularly, and the entire business is conducted as a unit. The population served is about 335,000, and this company conducts the entire gas business for the city and suburbs. No. of customers, 66,000.

By the terms of the merger the Citizens Gas Co. leases the property of The Indianapolis Gas Co. for a period of 99 years and pays the interest on \$4,833,000 Consolidated Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extension to the leased property. The lessee also pays a rental equivalent to 6% per annum on the \$2,000,000 of capital stock of The Indianapolis Gas Co. If the price of gas is reduced to 50 cents per thousand cu. ft. this

rental is increased to  $6\frac{1}{2}\%$ , and if the price is reduced to 45 cts. per thousand cu. ft. the rental will be increased to  $6\frac{3}{4}\%$  per annum, beyond which rate there will be no increase.

• • • • •

## Public Utilities

2313

• • • • •

Indianapolis Gas Co. (Operated under lease).—Inc. in 1890 in Ind.; consolidation of Indianapolis Gas, Light & Coke Co.; the Electric Lighting, Gas Heating & Illuminating Co. and Indianapolis Natural Gas Co. Natural gas supplied until 1903; but in 1902, a combined coal gas and water gas plant was constructed and placed in operation. The property and business of the Company is leased for 99 years from Oct. 1, 1913, to the Citizens Gas Co. of Indianapolis on terms outlined in that Company's statement. Company has surrendered its franchise and operates under an inteterminate permit granted by the Public Service Commission of Indiana.

Capital Stock.—Authorized and outstanding, \$2,000,000; par, \$50. Registrar: Central Union Trust Co., New York. Transfer office, 80 Broadway, New York. Dividends of 6% per annum are guaranteed by the Citizens Gas Co. of Indianapolis under the lease, payable semi-annually, J & J 1.

Funded Debt.—\$5,357,000 First Consolidated Gold 5s; dated Oct. 1, 1902; due Oct. 1, 1952; int. A & O 1, at Equitable Trust Co., New York, Trustee. Coupon, \$1,000; principal may be registered. Authorized issue, \$7,500,000; unissued bonds reserved for betterments and extensions up to 90% of cost. Interest guaranteed by Citizens Gas Co. of Indianapolis. Secured on the property owned by the Indianapolis Gas Co. and leased to the Citizens Gas Co., but not a lien on the unleased property of the former company. In April, 1915, \$163,000 of these bonds were publicly offered at 96 and interest, yielding  $5\frac{1}{4}\%$ . Mortgage does not contain tax free covenant.

Officers: Volney T. Malott, Pres.; L. C. Boyd, V-P; William J. Yule, Sec.; Arthur V. Brown, Treas. Directors: Volney T. Malott, William G. Irwin, Fred C. Dickson, Gavin Payne, J. G. Schmidlapp, L. C. Boyd, Arthur V. Brown.

• • • • •

**PLAINTIFFS' EXHIBIT 97-A.**

54

**Public Utilities**

• • • • •

**Citizens Gas Company of Indianapolis**

Officers: G. A. Efroymsen, Pres.; C. L. Kirk, V-P.; F. G. Rastenburg, Sec.; J. I. Dissette, Treas.

Voting Trustees: Thos. L. Sullivan, Pres.; Frank C. Dailey, Herman Lieber, Carleton B. McCulloch, Gustav A. Schnull.

Directors: E. H. Evans, H. H. Hornbrook, C. L. Kirk, J. I. Dissette, G. A. Efroymsen, Walter B. Harding, William H. Insley, Franklin Vonnegut, Indianapolis, Ind.

---

History and Properties—Incorporated May 23, 1906, in Ind., and on Oct. 31, 1907, acquired the distributing system and property formerly owned by the Consumers' Gas Trust Co., a natural gas company which had been placed in liquidation by order of the courts. The Company immediately constructed a water gas plant with a capacity of about 2,000,000 cu. ft. of gas per day, which was placed in operation in April, 1909. It also constructed 50 by-product coke ovens, which were first put into commission in Nov. 1909. In 1913 it constructed 50 additional coke ovens of the same type and in 1919 placed in operation another battery of 40 ovens of improved design. In 1927, it constructed a new battery of 40 coke ovens of latest design to replace the 100 ovens built in 1909 and 1913, which were removed from service. In 1929, it constructed another battery of 40 ovens of the same type as those built in 1927, the total number of ovens now being 120. On Oct. 1, 1913, the Company acquired by 99-year lease the plant and distribution system of The Indianapolis Gas Co., which company had a well-equipped water gas plant having a capacity of over 4,000,000 cu. ft. of gas per day, and had undertaken the construction of by-product coke ovens for its regular supply of gas. The Citizens Gas Co. completed the ovens and put them into commission about the middle of Feb., 1914. Under ordinary conditions the entire supply of gas for the city of Indianapolis is derived from the by-product coke ovens, the water gas plant being operated only in times of emergency, or when there is a sudden

increase in the demand for gas. Both the owned and the leased plants are operated regularly, and the entire gas business for the city and suburbs. No. of customers, Dec. 31, 1934, 75,420, compared with 73,370 in 1933, 73,889 in 1932, 77,736 in 1931, 78,634 in 1930 and 79,536 in 1929.

By the terms of the merger the Citizens Gas Co. leases the property of the Indianapolis Gas Co. for a period of 99 years and pays the interest on that company's Consolidated Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. The lessee also pays a rental equivalent to 6% per annum on the \$2,000,000 of capital stock of The Indianapolis Gas Co.

Court Ruling on Ownership—Federal Judge Baltzell ruled on Feb. 26, 1930, that gas consumers and citizens of Indianapolis are the real owners and beneficiaries of Company, a public trust. Court upheld the City's claim for possession of Company before Aug. 30, 1930, to administer it for the benefit of the citizens.

56

## Public Utilities

## The Indianapolis Gas Company

(Leased to Citizens Gas Company of Indianapolis)

Officers. Wm. G. Irwin, Pres.; Arthur V. Brown, V-P.; William J. Yule, Sec.; Arthur V. Brown, Treas.

Directors: William G. Irwin, Arthur V. Brown, L. B. Ewbank, W. R. Higgons, Frederick G. Appel, P. C. Reilly, Sampel C. Sutphin.

Office, Indianapolis, Ind.

---

History and Property—Incorporated in 1890, in Indiana; consolidation of Indianapolis Gas, Light & Coke Co.; the Electric Lighting, Gas Heating & Illuminating Co. and Indianapolis Natural Gas Co. Natural gas supplied until 1903; but in 1902, a combined coal gas and water gas plant was constructed and placed in operation. The property and business of the Company is leased for 99 years from Oct. 1, 1913, to the Citizens Gas Co. of Indianapolis on terms outlined in that Company's statement. Company has surrendered its franchise and operates under an

indeterminate permit granted by the Public Service Commission of Indiana.

### Capital Stock

Poor's Rating—B\*—Better Grade Speculative.

Authorized and outstanding, \$2,000,000; par \$50.

Number of stockholders at Dec. 31, 1934, 375.

Transfer Office—116 E. Market St., Indianapolis, Ind.

Registrar—The Union Trust Co., Indianapolis, Ind.

Price Range \*1934 \*1933 1932 1931 1930 1929 1928

High .....45 50 45 50 57 55 59

Low .....42 38 bid bid bid bid bid

\*High and low bid prices.

Dividends—6% per annum are guaranteed by the Citizens Gas Co. of Indianapolis under the lease, payable semi-annually, January and July 1.

Annual Meeting—Third Wednesday in January.

### Funded Debt

\$6,863,000 First Consolidated Gold 5s; Due October 1, 1952

Poor's Rating—B\*\*--Business Man's Investment.

Dated October 1, 1902.

Interest Payable April and October 1, at The Chase National Bank of the City of New York.

Denomination—Coupon, \$1,000; principal may be registered.

Trustees—The Chase National Bank of the City of New York and Ferdinand Winter, Indianapolis.

Registrar—Central Hanover Bank and Trust Co., New York.

Provisions of Issue—Authorized issue, \$7,500,000; outstanding, \$6,863,000; unissued bonds reserved for betterments and extensions up to 90% of cost.

Guaranty—Interest guaranteed under terms of lease by Citizens Gas Co. of Indianapolis.

Security—Secured on the property owned by the Indianapolis Gas Co. and leased to the Citizens Gas Co., but not a lien on the unleased property of the former company.

• • • • •



## PLAINTIFFS' EXHIBIT 98-A.

Moody's Analyses of Investments

373

## Citizens Gas Company of Indianapolis

History: Incorporated under Indiana laws, May 23, 1906, and in October, 1907, acquired the distributing system and property formerly owned by the Consumers' Gas Trust Co. Company owns a water gas plant with a capacity of 2,000,000 cubic feet per day, serving a population of about 335,000. Franchises of company extend until 1930. Owns the entire capital stock of the Milburn By-Products Coal Co. Gas sales: 1918, 2,513,774,000 cu. ft.; 1919, 2,698,589,000 cu. ft.; 1920, 3,051,634,000 cu. ft.; 1921, 2,792,228,000 cu. ft.; 1922, 2,632,060,000 cu. ft.

Lease of Indianapolis Gas Co.: On October 1, 1913, the company leased for 99 years the property and business of the Indianapolis Gas Co., and is now in control of the entire gas business of the City of Indianapolis and the environs, having a population in excess of 250,000. The Indianapolis Gas Co. had at the date of lease a complete water gas plant, having a capacity of 6,000,000 cubic feet of gas per day. It had been operating coal gas retorts from which it supplied about one-third of its total output of gas, but had begun the construction of a by-product coke oven plant with a capacity of about 5,000,000 cubic feet of gas per day. Under the terms of the lease, the lessor was required to complete the construction of these ovens, and they were put into commission in February, 1914. At the date of the lease the Indianapolis Gas Co. had 383.15 miles of mains in its distributing system, which were increased to 387.34 miles by the end of the year. The combined manufacturing capacity of the plant now controlled by the Citizens Gas Co. is therefore 8,500,000 cubic feet of coke oven gas and 8,000,000 cubic feet of water gas. It is the purpose of the company to furnish only coke oven gas except in emergencies or for the purpose of making up deficiencies in its supply. The combined system of mains at the close of 1922 comprised 650 miles. The company had at that date 67,561 meters in use.

By the terms of the lease, the Citizens' Gas Co. leases the property of the Indianapolis Gas Co. for a period of 99 years and pays the interest on \$4,833,000 Consolidated

Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. The lessee also pays a rental equivalent to 6% per annum on the \$2,000,000 of capital stock of the Indianapolis Gas Co. If the price of gas is reduced to 50 cents per thousand cubic feet this rental is increased to 6½%, and if the price of gas is reduced to 45 cents per thousand cubic feet, the rental will be increased to 6¾% per annum, beyond which rate there will be no increase.

• • • • •

Table A.—Bond Records and Ratings (Based on Five Year  
Income Results, Etc.)

Name of Issue	Interest Payable	Maturity	Authorized	Outstanding	Average Income Available	Interest Required Per Annum	Factor of Safety	Security	Solability	Rating
1. Indianapolis Gas Co. 1st cons 5 A&O O. 1952			\$7,500,000	\$5,357,000	\$867,941	\$267,850	69%	High	Good	Aa
2. Ctr. Gas of Ind. 1st & ref. 5... J&J J1. 1942			10,000,000	3,848,000		( 132,400	40%	Good	"	A
3. Ctr. Gas of Ind. gen. & ref. 7s. M&N My 1927			1,000,000	1,000,000	480,091	70,000	40%	Strong	Fair	Baa

Note: Average income available on No. 1 is average net revenue for five years shown in income account. Income available for No. 2 is after deducting interest requirement on No. 1 and guaranteed dividend (\$120,000) on Indianapolis Gas Co. stock. For reference notes see next page.

374

Moody's Analyses of Investments

1. Indianapolis Gas Co. first consolidated 5s: Dated Oct. 1, 1902; due Oct. 1, 1952. Interest paid A. & O. at Equitable Trust Co., New York. Trustee: Equitable Trust Co., New York, and Ferdinand Winter, Indianapolis. Registrar: Central Union Trust Co., New York. Coupon, \$1,000, registerable as to principal. Interest guaranteed under terms of lease by Citizens' Gas Co. of Indianapolis. Secured by a first mortgage on all property of the Indianapolis Gas Co. Unissued bonds reserved for improvements at 90% of cost. Listed on New York Stock Exchange. Company does not pay normal income tax.

• • • • •

(PLAINTIFFS' EXHIBITS 99 TO 109.)

• • • • •

“(Plaintiffs' Exhibits 99 to 109, inclusive, are photostats of the pages from Moody's Manual of Investments—Public Utility Securities—for the years 1924 to 1934, inclusive, which set forth material with respect to Citizens Gas Company of Indianapolis and The Indianapolis Gas Company. Statements appear in each of these 11 exhibits which are substantially identical with the statements quoted above from Plaintiffs' Exhibit 98-A from Moody's Manual of Investments—Public Utility Securities—for 1923).”  
(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' EXHIBIT 110.

2336

Moody's Manual of Investments

• • • • •

Citizens Gas Company of Indianapolis

History: Incorporated under Indiana laws, May 23, 1906, and in Oct., 1907, acquired the distributing system and property formerly owned by the Consumers' Gas & Trust Co. In 1905, company entered into a contract with the City of Indianapolis which provided that at the expiration of 25 years the city may assume possession of the company and its properties by payment of the face value of the common

stock plus interest not to exceed 10% per annum. This contract was part of franchise granted to the company in that year. In 1921 company surrendered its franchise and accepted an indeterminate permit from the Public Service Commission of Indiana. Owns entire capital stock of the Milburn By-Products Coal Co.

**Lease of Indianapolis Gas Co.:** On October 1, 1913, the company leased for 99 years the property and business of the Indianapolis Gas Co. By the terms of the lease the Citizens Gas Co. pays (a) the interest on the consolidated mortgage bonds outstanding, and will pay the interest on such additional bonds as may be issued for future extensions to the leased property; (b) a rental equivalent to 6% on outstanding capital stock of the Indianapolis Gas Co. (with a possible increase of \$15,000 if the price of gas to the consumer does not exceed 45 cents per M cu. ft.); (c) \$300 annually for organization expense; and (d) such amounts equal to the taxes levied against the property including Federal income tax.

Company controls the entire gas business of the City of Indianapolis and the environs having a population in excess of 425,000. Number of employees, Dec. 31, 1934, 718.

**Properties:** As of Jan. 1, 1935, the owned property of Citizens Gas Co. consisted of a coke oven plant, known as Prospect Street Station, comprising three batteries of forty 14-ton Wilputte ovens with a total daily capacity of 11,000,000 cu. ft. and two 8' 6" water gas sets having a total daily capacity of 1,800,000 cu. ft. and 9,000,000 cu. ft. of holder capacity. The distribution system consisted of approximately 336 miles of cast iron and steel mains. The leased property, owned by Indianapolis Gas Co., consisted of a coke oven plant of one battery of forty-one 15-ton Semet-Solvay coke ovens with a daily capacity of 3,500,000 cu. ft., also two 11' 0" and two 7' 6" water gas sets, with a total daily capacity of 6,000,000 cu. ft. and holder capacity of 3,000,000 cu. ft. The distribution system consisted of approximately 531 miles of cast iron and steel mains. It is the purpose of the company to furnish only coke oven gas except in emergencies or for the purpose of making up deficiencies in its supply. The combined system of mains at the close of 1934 comprised 867 (1933, 865) miles. On Dec. 31, 1934, company had 75,259 meters in use (1933, 73,370).

**City's Demand for Possession Under 1905 Franchise:** The basis of the move to bring this company under municipal ownership is the 1905 contract (see above) entered into between the company and the City of Indianapolis. In Mar., 1929, a formal demand was made by the city to the trustees and directors of the company for the transfer of the title and assets. Company's directors in Apr., 1929, acknowledged the city's right to take over the properties after the preferred and common stocks had been redeemed. In June, 1929, common stock certificate holders of the company filed suits alleging that public charitable trust in favor of inhabitants of the city and gas consumers was broken when city franchise was surrendered in 1921. On Feb. 26, 1930, Federal Judge Baltzell of the U. S. District Court at Indianapolis upheld the validity of the 1905 contract which permits the city to take possession of the property before Aug. 30, 1930, and administer it for the benefit of the citizens, ruling that city had not given up any of its rights through surrender of the company's franchise. In final decision on May 29, 1930, Federal Judge Baltzell dismissed stockholders suit. No action in regard to the transfer of title of the properties was taken, however, as the litigation was carried to the U. S. Circuit of Appeals. The latter court in Jan., 1931, affirmed the decision entered May 29, 1930, by the lower court. Both the district and the circuit courts held that holders of beneficial certificates of common stock would receive everything for which they had contracted in subscribing for the stock whenever they should be repaid the face value of their shares together with 10% annual cumulative dividend. On May 18, 1931, the U. S. Supreme Court at Washington stated that it would not review the right of the city to take over the company as no Federal question was involved. Under a bill signed early in 1933 by Governor P. V. McNutt, the city was empowered to issue 50-year 6% bonds, to provide the purchase price for the company's properties. In Dec., 1933, the City of Indianapolis applied to the Public Works Administration for a \$10,000,000 loan to acquire company's properties, but in Jan., 1934, it was explained that the PWA could make loans only for projects having a primary object of creating jobs.

**City Sells Bonds to Acquire Properties:** Under a resolution adopted May 7, 1935, by the Board of Directors for



Utilities of the City of Indianapolis, the city authorized the issuance of \$8,000,000 of gas plant revenue bonds for the purpose of obtaining funds to exercise its franchise rights to acquire the properties and business of Citizens Gas Co. of Indianapolis and for improvements and extensions to such properties.

The Indianapolis City Utilities District (see below) on May 29, 1935, sold to Otis & Co., Cleveland and Halsey, Stuart & Co., Inc., New York, the issue of \$8,000,000 gas plant revenue bonds, on a bid of 96.0625 for 4½s. Proceeds of the bond sale were to be used to acquire the Citizens Gas properties and for extensions and improvements thereof. The obligations that will be retired from the proceeds of this bond issue, in order to acquire company's properties, include company's \$2,000,000 in \$25 par common stock with accrued dividends of \$500,000; \$1,000,000 \$100 par preferred plus dividends of \$12,500 and a premium of \$50,000 together with \$2,800,000 in bonds. Upon retirement of these securities company's property will pass to the city, as provided by charter. Proceeds of the sale not used for retirement of company obligations will be used for working capital to make all necessary adjustment for supplying mixed gas to local consumers.

As of July 1, 1935, acquisition of company's properties had not been consummated.

**Description of City Bonds:**

City of Indianapolis (Ind.) gas plant revenue 4½s due 1938-67, incl.:

Authorized—\$8,000,000; to be outstanding, \$8,000,000.

Dated—June 1, 1935; due each June 1, 1938-67, incl.

Interest—J&D 1. at Halsey, Stuart & Co., Chicago or New York, Union Trust Co., Indianapolis, or Cleveland (O.) Trust Co.

Denomination—Coupon, \$1,000; registerable as to principal.

Security—These bonds constitute valid and binding obligations of the city and are secured by a charge upon all of the income and revenues of all the gas utility system now or hereafter owned and or operated by said city and payable solely and exclusively out of such income and revenues.

Special Fund—The city further covenants that it will cause to be deposited, in one or more Indianapolis banks, in a special account under such condition as that the monies

cannot be withdrawn from such account or accounts except for payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the city of said gas system out of the revenues derived from the operation, a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the city agrees that there will be credited in this manner to such bond and interest fund not less than \$360,000 annually in the years 1936 and 1937; \$450,000 annually in the years 1938 to 1940, incl.; \$500,000 annually in the years 1941 to 1967, incl.

Offered (\$8,000,000)—In July, 1935, by Halsey, Stuart & Co., and Otis & Co., New York.

Preferred and Common Stock Called for Redemption: See details below.

City Utility District: During the 1929 session of the Indiana Legislature a law was enacted creating a utility district for the City of Indianapolis. This district will have a bonding power up to 2% of the assessed valuation of the property in the utility district and will have the power either to operate or lease the utility property. The district may also issue revenue bonds in the name of the city which shall not constitute an indebtedness of the city or district. Its affairs will be administered by a Board of Trustees who are empowered to appoint a Board of Directors for the management of the gas properties. Under the interpretations of the courts the act of transfer will be one in which the present corporation will turn the trusteeship over to the City Utility District which will become the continuing trustee for the property. Trustees (Utility District): G. J. Marott, A. D. Hitz, W. J. Mooney. Directors (Utility District): H. L. Dithmer, Brodehurst Elsey, E. A. Kahn, Guy A. Wainright.

Management: Officers: G. A. Efroymsen, Pres.; C. L. Kirk, Vice-Pres. and Gen. Mgr.; J. I. Dissette, Treas.; F. G. Rastenburg, Sec. Directors: H. H. Hornbrook, E. H. Evans, J. I. Dissette, G. A. Efroymsen, W. H. Insley, Franklin Vonnegut, W. B. Harding, R. H. Sullivan, C. L. Kirk, Indianapolis. Annual Meeting: Second Monday in January. Office: Majestic Bldg., Indianapolis, Ind.

2338

## Moody's Manual of Investments

Bonded Debt: 1. Indianapolis Gas Co. first consolidated gold 5s, due 1952:

Authorized—\$7,500,000; outstanding, \$6,863,000.

Dated—Oct. 1, 1902; due Oct., 1952.

Interest Paid—A&O 1, at Chase National Bank, New York. Interest provided for under terms of lease by Citizens Gas Co. of Indianapolis.

Trustees—Chase National Bank, New York, and Ferdinand Winter, Indianapolis.

Registrar—Central Hanover Bank & Trust Co., New York.

Callable—Bonds are not subject to call.

Denomination—Coupon, \$1,000, registerable as to principal.

Security—First mortgage on all property of the Indianapolis Gas Co.

Additional Bonds—May be issued for improvements at 90% of cost.

Legal—For savings banks in New Hampshire.

Tax Status—Company does not pay normal income tax.

Rating, Baa

2. Citizens Gas Co. of Indianapolis first and refunding (now first) gold 5s, due 1942:

Authorized—\$10,000,000; outstanding, \$2,858,500; held in sinking fund, \$1,279,500.

Dated—July 1, 1912; due July 1, 1942. In the event that before Aug. 30, 1930, either the franchise of the company granted on Aug. 25, 1905, or any franchise substituted therefor and not extending beyond the date of maturity shall not be duly extended for a period extending beyond 1942 then, unless necessity for securing extension in order to enable the company to continue to conduct its business, shall in opinion of the Trustee have been obviated to its satisfaction all the bonds shall become due and payable and the bonds shall be deemed to be matured debts of the company.

Interest Paid—J&J 1, at Bankers Trust Co., New York.

Trustees—Bankers Trust Co., New York, and Union Trust Co., Indianapolis.

Denomination—Coupon, \$500 and \$1,000; registerable as to principal.

Callable—At 108 on any interest date on 30 days' notice. Bonds may also be purchased for sinking fund (which see).

Sinking Fund— $\frac{1}{4}$  of 1% in 1915 and 1916;  $\frac{1}{2}$  of 1% thereafter to purchase bonds at not exceeding call price. Bonds so purchased or redeemed to be held alive and draw interest for sinking fund.

Security—First mortgage on all property of Citizens Gas Co. of Indianapolis.

Additional Bonds—May be issued for 80% of cost of improvements, etc., only when net earnings are twice interest charges on all bonds.

Legal—For savings banks in New Hampshire.

Quoted—In New York.

Tax Status—Company does not pay normal income tax.

Offered—(\$400,000) at 101 in July, 1912, by Payne, Bush & Co., Union Trust Co., Otto F. Haueisen & Co., O. M. Ragsdale & Co., and Newton Todd, Indianapolis; (\$750,000) at 88 $\frac{1}{2}$  in June, 1922, by Hemphill, Noyes & Co., and Huntington, Jackson Co., New York.

Price Range:		1934	1933	1932	1931	Rating, Baa	
High	.....	90 $\frac{1}{2}$	80	93	104 $\frac{1}{2}$	103 $\frac{1}{2}$	104
Low	.....	bid	bid	78	92	99 $\frac{1}{2}$	97

Note: The entire outstanding common stock was called for redemption July 1, 1935 at \$31.25 per share, plus dividends at the rate of 10% up to July 1, 1935 at the company's office. Such retirement is to be made through funds provided by the City of Indianapolis, as a step in the taking over of the company's property pursuant to the provisions of the Articles of Incorporation (see details above). As of July 23, 1935, over 75% of common stock was retired.

Liquidating Dividend Rescinded: Action of directors with reference to payment of a liquidating dividend of \$5.00 per share on May 15, 1929 and the payment of a cash dividend of 14% on said stock on the same day, was rescinded, inasmuch as several stockholders brought suit in the United States District Court at Indianapolis, enjoining the directors from making the partial payment ordered to be made May 15. Trial was held in the United States District Court

May 5, 1930. Decision rendered May 29, 1930 upheld previous ruling that Citizens of Indianapolis are the real owners and beneficiaries of this company. Unless further litigation is brought forth it will fall the duty of the Gas Co. trustees and directors to carry out the refunding of common stock certificates by part payment.

\*       \*       \*       \*       \*       \*

1235

## PLAINTIFFS' EXHIBIT 111A.

July 19, 1935.

Mr. William J. Yule, Secretary,  
The Indianapolis Gas Company  
1004 Majestic Building,  
Indianapolis, Indiana.

Indianapolis Gas Company Indenture dated  
October 1, 1902

Dear Sir:

We enclose a letter dated July 17, 1935 which we have received from Messrs. Scudder, Stevens & Clark, regarding the lease to Citizens Gas Company of the property subject to the lien of the above mortgage and the City of Indianapolis taking over the assets of Citizens Gas Company. Kindly furnish Messrs. Scudder, Stevens & Clark with the information desired and forward to the undersigned a copy of your reply for our information.

Yours very truly,

Paul C. Beardslee,

*Assistant Trust Officer.*

656-HL

Encl.

1236

PLAINTIFFS' EXHIBIT 111B.

Scudder, Stevens & Clark

10 Post Office Square,  
Boston

July 17, 1935.

Chase National Bank,  
New York City.

Attention: Corporate Trust Dept.

Dear Sirs:

Would you kindly inform me as to whether the Cities Utilities District of Indianapolis, which has acquired the assets of the Citizens Gas Company, has legally assumed the lease of the Indianapolis Gas Company? I am requesting this information of you inasmuch as I believe that you would have official notice as the trustee for the Indianapolis Gas First Mortgage 5's of 1952.

Kindly direct your reply to the attention of the undersigned.

Very truly yours,

(signed) Allan T. Burros  
A. T. Burros.

1237

PLAINTIFFS' EXHIBIT 111-C.

1004 Majestic Building,  
Indianapolis, Indiana.

August 17, 1935.

Scudder, Stevens & Clark,  
10 Post Office Square,  
Boston, Massachusetts.

Attention: Allan T. Burros

Gentlemen:

Your letter of July 17th addressed to The Chase National Bank has been referred to us. We have delayed our reply in the expectation that we could give you a more definite answer to your question that we are at present able to do.

The City of Indianapolis through its Utilities District is arranging to take over the operation of the gas properties in Indianapolis through the exercise of its established right



to acquire the property of the Citizens Gas Company who hold a ninety-nine year lease for our plant and system. Inasmuch as the Utilities District has provided several million dollars for the purpose of perfecting its title to the property of the Citizens Gas Company and the greater portion of the common stock of the Citizens Gas Company has been acquired through this fund, we presume that the City has an equitable though not a legal title to the property at the present time. Until the City has a legal title it could not legally assume the lease, but we are advised that this should follow as a matter of course when the other property is transferred.

Yours very truly,

The Indianapolis Gas Company

By

*Secretary.*

Copy to The Chase National Bank.

1238

PLAINTIFFS' EXHIBIT 112.

September 6, 1935.

Mr. William J. Yule, Secretary,  
The Indianapolis Gas Company,  
1004 Majestic Building,  
Indianapolis, Indiana.

The Indianapolis Gas Company Deed of Trust dated  
October 1, 1902

Dear Sir:

We enclose for your attention, letter dated September 4, 1935 received from Mr. Leonard S. Hole of Russell, Eerg & Company, Boston, requesting information as to the present status of the bonds issued under the above mortgage and the lease of your company's properties to Citizens Gas Company. Will you please communicate direct with Mr. Hole in reply to his inquiries and forward a copy of your reply to the undersigned.

Yours very truly,

Paul C. Beardslee

*Assistant Trust Officer.*

Enclosure  
656-RLI

1239

PLAINTIFFS' EXHIBIT 112A.

Russell, Berg & Company  
75 Federal Street  
Boston

September 4, 1935.

Chase National Bank  
Corporate Trust Department  
New York City.

Gentlemen:

We are in hopes that your bank as Trustee of the Indianapolis Gas Company 5s of 1952 will be above to furnish us with an accurate statement of the present status of the Indianapolis Gas Company bonds, since the properties of the Citizens Gas Company of Indianapolis were acquired by the City of Indianapolis. Will the servicing of these bonds constitute an operating charge against the gas properties prior in lien to the Indianapolis Gas bonds recently sold to the public? Has the City of Indianapolis considered the formal assumption of these bonds, in which case I presume they will acquire the tax-free status of municipal bonds? From what source will the Indianapolis Gas Company bonds be paid at maturity? What is the status of the 99-Year lease from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis?

Any information you can give us on this matter will be greatly appreciated as the services do not seem to contain very accurate information on the subject.

Very truly yours,

Russell, Berg & Company

LSH:MA

By (signed) Leonard S. Hole.

1240

## PLAINTIFFS' EXHIBIT 113.

September 19, 1935.

Mr. William G. Irwin, President,  
Indianapolis Gas Company  
Indianapolis  
Indiana.

Indianapolis Gas Company First Consolidated  
5% Bonds due October 1, 1952

Dear Sir:

We are receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District in attempting to abrogate the lease made by your Company with the Citizens Gas Company in 1913. Bondholders state that such action would materially affect the security of their bonds and we would be obliged if you will be good enough to write us such information as we can pass on to bondholders with respect to this situation.

We will also be obliged if you will forward us a copy of the above mentioned lease and also advise us what action is being taken to protect the interests of the bondholders.

Thanking you in advance for your prompt attention to this letter, we are

Very truly yours,

Paul C. Beardslee

*Assistant Trust Officer.*

PSB-z

1241                    PLAINTIFFS' EXHIBIT 114.

Copy of Telegram

Mr. William G. Irwin President  
Indianapolis Gas Company  
Indiana Indiana

October 1, 1935.

We have received no response to our wire of yesterday to George Hill Auditor Citizens Gas with respect to interest due today on Indianapolis Gas Company First Mortgage Bonds please wire whether or not funds will be forthcoming Stop We also await with interest reply to our letter to you of September nineteenth.

P. C. Beardslee—Corporate Trust.

1242                    PLAINTIFFS' EXHIBIT 115.

October 3, 1935.

Mr. W. Y. Yule, Secretary,  
Indianapolis Gas Company,  
Indianapolis,  
Indiana.

Indianapolis Gas Company First Consolidated  
5% Bonds due October 1, 1952

Dear Sir:

We enclose herewith a copy of our letter of September 19 to Mr. William G. Irwin, President of your Company, to which we have received no reply. We also wired him on September 1 with respect thereto.

We are continually receiving inquiries with respect to the above described issue of bonds. The thought occurred to us that possibly Mr. Irwin is out of the city. We are, therefore, addressing a letter to you, hoping you can supply us with the information requested.

Thanking you for your kind cooperation, we are

Very truly yours,

PCB:z  
Enc.

Paul C. Beardslee

*Assistant Trust Officer.*

1243

## PLAINTIFFS' EXHIBIT 116.

Indianapolis, Indiana

November 7, 1935.

The Chase National Bank,  
11 Broad Street  
New York, N. Y.

In re: The Indianapolis Gas Company Deed of  
Trust Dated October 1, 1902

Gentlemen:

Pursuant to a resolution adopted by the Board of Directors of The Indianapolis Gas Company, the following facts relative to the property and business of the Company are sent to you as Trustee of our First Mortgage 5% Bonds.

Assuming to act under legislative authority and pursuant to provisions of the city franchise and articles of incorporation of the Citizens Gas Company of Indianapolis, the City of Indianapolis has taken over the property of that Company, and is now operating the same by its Board of Directors for Utilities, and is assuming to enter upon the discharge of the obligations of the Citizens Gas Company to its bondholders and stockholders. The City of Indianapolis, however, has refused to accept an assignment of the ninety-nine year lease, executed on September 30, 1913, by this Company to the Citizens Gas Company, by which all the property of this Company was leased to the Citizens Gas Company.

Under the circumstances, this Company through action of its Board of Directors, entered into a stipulation with the said City of Indianapolis, by which it was provided that the City, through its Board of Directors for Utilities, will continue the operation of the property of this Company for a period of six months pending negotiations, and that they will pay an amount for rental for said period equal to the amount of rental payable according to the terms of the lease. Preliminary meetings between representatives of this Company and representatives of the City have resulted in nothing definite.

Our Board of Directors is attempting to safeguard the legal position of both the bondholders and stockholders of the Company and have retained Hon. Newton D. Baker of

Cleveland, Ohio, as additional counsel. The Indianapolis Gas Company will be pleased to receive any suggestions you desire to make in the premises.

Very truly yours,

The Indianapolis Gas Company

By (signed) W. Y. Yule,

*Secretary.*

1244

PLAINTIFFS' EXHIBIT 117.

December 2, 1935.

Mr. W. Y. Yule, Secretary  
The Indianapolis Gas Company  
1004 Majestic Building  
Indianapolis, Indiana.

The Indianapolis Gas Company Deed of Trust  
dated October 1, 1902.

Dear Mr. Yule:

We wish to refer to your letter of November 7 in which you advise that preliminary meetings between representatives of the Company and representatives of The Indianapolis Utilities District are being held with respect to the assumption by the Utilities District of the lease of the Indianapolis Gas Company properties to the Citizens Gas Company.

We will appreciate it if you will keep us fully informed of the progress of the negotiations so that we may be in a position to take such action as may seem appropriate to protect the interest of the bondholders.

Very truly yours,

Paul C. Beardslee,

*Assistant Trust Officer.*

PSB-z



1245

## PLAINTIFFS' EXHIBIT 118.

February 26, 1936.

Mr. W. Y. Yule, Secretary,  
The Indianapolis Gas Company,  
1004 Majestic Building,  
Indianapolis, Indiana.

Re: The Indianapolis Gas Company Deed of Trust  
dated October 1, 1902

Dear Sir:

In your letter of November 7, 1935, you advised that preliminary meetings between representatives of your company and representatives of the Indianapolis Utilities District were being held with respect to the assumption by Indianapolis District of the lease of the Indianapolis Gas Company's properties to the Citizens Gas Company.

As we have recently received several inquiries from bondholders, we would appreciate your informing us of any recent developments in the matter.

Yours very truly,

Paul C. Beardslee,

645-MVB

*Assistant Trust Officer.*

1246

## PLAINTIFFS' EXHIBIT 119.

1004 Majestic Building  
Indianapolis, Indiana,  
March 2, 1936.

The Chase National Bank,  
Trust Department,  
11 Broad Street,  
New York, N. Y.

Attention: Mr. P. C. Beardslee, Ass't Trust Officer.

Gentlemen:

Referring to your letter of February 26th in respect to any recent developments in the negotiation between this Company and the City affecting our lease, we wish to say that the Company expects to have a representative in New York early next week who will advise you fully regarding this matter.

Yours very truly,

The Indianapolis Gas Company

By Wm. J. Yule,

Wm. J. Yule, *Secretary.*

1247

**PLAINTIFFS' EXHIBIT 120.**

**Citizens Gas and Coke Utility—Successor to  
Citizens Gas Company  
Majestic Building**

Address all communications  
to the company

Telephone  
Riley 5421

**Indianapolis, Indiana**

**November 1, 1935.**

**Chase National Bank, Trust Revenue Division,  
11 Broad Street,  
New York, N. Y.**

Gentlemen:

We enclose herewith Indiana National Bank draft number 90195 in amount \$421.44 drawn to your order. This remittance is in payment of your invoice number 33656 covering commission for paying Indianapolis Gas Company Bond Coupons due October 1, 1935, in like amount.

For your convenience we attach stub of your invoice. We trust same will be found correct.

Very truly yours,

**Citizens Gas and Coke Utility**

*Acting Auditor.*

Received Payment

Nov 4 1935

**The Chase National Bank  
of the City of New York**

By .....

11G13

Enclosures.

Approved for Filing

By .....

## 1248 PLAINTIFFS' EXHIBIT 120-A.

Folder Copy

Trust Revenue Division  
No 33656The  
Chase  
National  
Bank

October 2, 1935.

Commission for paying coupons due October  
1, 1935 detached from Indianapolis Gas Com-  
pany 5% First Consolidated Mortgage Bonds.  
 $\frac{1}{4}$  of 1% on \$168,575.

\$421.44

Auditor,  
Citizens Gas Company,  
Majestic Building,  
Indianapolis, Indiana.

Prepared	Checked	Division	Head	Bill	Posted	Remittance
						Posted

NS

RR

NS

---

Date Paid  
11-4-35

---

Approved

Trust N 19 1-35

1249

PLAINTIFFS' EXHIBIT 121.

1004 Majestic Building,  
Indianapolis, Indiana,  
March 26, 1936.

The Chase National Bank,  
Trust Department,  
11 Broad Street,  
New York, N. Y.

Attention: Henry R. Harrison, Assistant Trust Officer.

Gentlemen:

Referring to your letter of March 19th in respect to the semi-annual interest due April 1, 1936, on the First Consolidated Mortgage 5% Bonds of this Company, we enclose herewith our check No. 2679 on The Indiana National Bank of this City payable to your order in the amount of \$168,575. This covers the interest due on 6743 bonds. We have not included interest on 120 bonds which are held in our Treasury and 18 bonds which remain in the Treasury of the Citizens Gas & Coke Utility successor to the Citizens Gas Co. of Indianapolis. Coupons from these bonds will be forwarded to you in due course.

Yours very truly,

The Indianapolis Gas Company,  
By Wm. J. Yule (signed)  
Wm. J. Yule, Secretary.

## PLAINTIFFS' EXHIBIT 122

## Additions and Betterments

1250

to

Plant and System of The Indianapolis Gas Company

Reported by

Citizens Gas and Coke Utility

September 9, 1935 to Dec. 31, 1938

Period	Total	Plant	Pratt St.	Mains	Services	Meters 1st Inst.
July 1, 1935 to Dec. 31, 1935	\$ 18,357.95	\$ None	\$ None	\$ 14,919.79	\$ 3,044.55	\$ 393.61
July 1, 1935 to Sept. 8, 1935	12,698.18	None	None	11,158.28	1,417.40	122.50
Sept. 9, 1935 to Dec. 31, 1935	\$ 5,659.77	\$ None	\$ None	\$ 3,761.51	\$ 1,627.15	\$ 271.11
Jan. 1, 1936 to Dec. 31, 1936	28,776.91	167.58	1,734.66	23,608.97	2,213.24	1,387.62
Jan. 1, 1937 to Dec. 31, 1937	11,565.30	None	194.33	9,098.44	1,469.91	802.62
Jan. 1, 1938 to June 30, 1938	16,736.51	None	1,162.77	7,044.32	4,422.05	4,107.37
Sept. 9, 1935 to June 30, 1938	\$ 62,738.49	\$ 167.58	\$ 3,091.76	\$ 43,513.24	\$ 9,732.35	\$ 6,568.72
July 1, 1938 to Dec. 31, 1938	32,597.98	None	None	23,859.21	6,736.02	2,002.75
Sept. 9, 1935 to Dec. 31, 1938	\$ 95,336.47	\$	\$ 3,091.76	\$ 67,372.45	\$ 16,468.37	\$ 8,571.47

1251                      PLAINTIFFS' EXHIBIT 123-A.

Indianapolis, Indiana,

May 12, 1936.

Minutes of a Called Meeting of the Board of Directors  
of

The Indianapolis Gas Company

A called meeting of the Board of Directors of The Indianapolis Gas Company was held on Tuesday, May 12, 1936, at 9:45 o'clock A. M.

Present: Messrs. Appel, Brown, Ewbank, Higgins, Irwin, Reilly and Smith.

Absent: None.

The meeting was called to order by the President, Mr. Irwin, and consideration was given to a letter received from Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, which letter is as follows.

. . . . .  
“(Here appears a copy of the letter dated April 8, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which letter is in evidence as City's Stipulation Exhibit 80)”

(Inserted pursuant to stipulation filed November 22, 1939.)

On motion of Mr. Higgins, seconded by Mr. Ewbank, the following resolution was unanimously adopted:

Resolved, That the Secretary of the Company be, and he is hereby directed to acknowledge letter addressed to this Company under date of April 8, 1936, by Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, by transmitting to them the following letter which is hereby approved and authorized by this Board.

. . . . .  
“(Here appears a copy of the letter dated May 12, 1936 from The Indianapolis Gas Company to Thompson, Rabb & Stevenson, a copy of which letter is in evidence as City's Stipulation Exhibit 81.)”

(Inserted pursuant to stipulation filed November 22, 1939.)



1252

## PLAINTIFFS' EXHIBIT 123-B

Consideration was given to the following letter received from Messrs. Baker, Hostetler, Sidlo and Patterson under date of May 4, 1936.

• • • • •

“(Here appears a copy of a letter dated May 4, 1936 from Baker, Hostetler, Sidlo & Patterson to The Indianapolis Gas Company.)”

(Inserted pursuant to stipulation filed November 22, 1939.)

On Motion of Mr. Higgins, seconded by Mr. Brown,

1253

## PLAINTIFFS' EXHIBIT 123-C

it was unanimously voted to direct the Secretary to send the following letter to Messrs. Baker, Hostetler, Sidlo and Patterson.

• • • • •

“(Here appears a copy of a letter dated May 12, 1936 from The Indianapolis Gas Company to Baker, Hostetler, Sidlo & Patterson.)”

(Inserted pursuant to stipulation filed November 22, 1939.)

There being no further business, on motion duly seconded, the meeting adjourned.

William E. Morin,  
*Chairman.*

Wm. J. Yule,  
*Secretary.*

## PLAINTIFFS' EXHIBIT 124.

• • • • •

“(This exhibit is identical with Plaintiffs' Exhibit 93.)”  
(Inserted pursuant to stipulation filed November 22, 1939.)

1254

PLAINTIFFS' EXHIBIT 125.

Massachusetts Mutual Life Insurance Company  
Springfield, Massachusetts

Re: Indianapolis Gas Company Mortgage  
Dated October 1, 1902

The Chase National Bank of the City of New York,  
as Trustee under The Indianapolis Gas Company  
Mortgage dated October 1, 1902

11 Broad Street  
New York, New York

Dear Sirs:

The undersigned are the owners and holders of \$265,000 principal amount of Indianapolis Gas Company First and Consolidated Mortgage Five Per Cent Gold Bonds due October 1, 1952 and outstanding under the above described Mortgage.

It is our understanding that a default in the payment of interest on the above described bonds is threatened by the reason of a refusal of the City of Indianapolis through the medium of the Board of Directors for Utilities of the City of Indianapolis to recognize the validity of the lease made by the Indianapolis Gas Company to Citizens Gas Company of Indianapolis on September 30, 1913, which provided for a lease of all of the property of Indianapolis Gas Company to Citizens Gas Company of Indianapolis, in consideration, among other things, of the covenant of Citizens Gas Company of Indianapolis to pay to the Trustee under the above described Mortgage the interest on all of the above described bonds outstanding thereunder and to refund said bonds at maturity or provide for their extension.

In view of this threatened default, we hereby request you, as Trustee under the said Mortgage, to request the opinion of the firm of Messrs. Baker, Hostetler, Sidlo & Patterson in Cleveland, Ohio, on the following points:

1. Whether the lease above referred to belongs in law and equity to the body of the trust created by the above described Mortgage and forms part of the security for the above described bonds.

2. Whether you, as Trustee, upon our request, have the right under the said Mortgage, prior to a default in

payment of interest on said bonds, to proceed, as plaintiff in a civil suit, either in law or equity, against Citizens Gas Company of Indianapolis, Indianapolis Gas Company, the City of Indianapolis, the Board of Directors for Utilities of the City of Indianapolis, and any other appropriate parties to such a suit, seeking an adjudication of the validity of the said lease and the establishment of the same as a part of the body of the trust created by said Mortgage for the security and protection of said bonds.

3. Whether the reasonable compensation and expense of your counsel and attorneys in any such suit 1255 would be a proper and legal charge against the body of the trust created by said Mortgage.

4. Whether such a suit could be maintained in the United States District Court for the District of Indiana.

We further request you, if the opinion of Messrs. Baker, Hostetler, Sidlo & Patterson to all the questions listed above is in the affirmative, to institute a suit of the kind above referred to in the United States District Court for the District of Indiana through Messrs. Baker, Hostetler, Sidlo & Patterson, and such other local attorneys in Indianapolis as may be mutually satisfactory to you and said firm, and upon such other conditions as you may reasonably deem desirable, and to take such other appropriate legal or equitable remedies as you being advised by said firm shall determine to be most effectual to protect and enforce your rights and those of the holders of said bonds.

Date: April 16, 1936.

Very truly yours,

Massachusetts Mutual Life Insurance Company

By: H. S. Payson Rowe

*Manager.*

The following numbers are the bonds held by us:

548, 781/2, 1001, 1007, 1038, 1151, 1171, 1385, 1401/2 1451, 1618, 2043/47, 2150/52, 2317, 2409, 2486, 2620/1, 2726/7, 2780/83, 2827, 2955, 3012/3, 3019/29, 3076, 3113/15, 3130/1, 3473/4, 3861, 4039, 4097, 4276, 4301/3, 4399, 4521, 4552/3, 4557, 4607, 4691/2, 4725/6, 4788, 4830, 4899/900, 4906/7, 4935, 4976, 5153, 5172, 5188, 5281, 5477/80, 5482/4, 5544/5, 5559, 5570/73, 5607/8, 6285/300, 6310/21, 6324/26, 6385/6415, 6466/6484, 6545/59, 6676/97, 6701/34, 6793/805.

1256

PLAINTIFFS' EXHIBIT 126.

New England Mutual Life Insurance Company  
Eighty-Seven Milk Street  
Boston, Massachusetts

Treasurer  
Wallace D. Dexter, Jr.

Assistant Treasurers  
Dwight Foster  
William A. Kugler

Re: Indianapolis Gas Company Mortgage  
Dated October 1, 1902

The Chase National Bank of the City of New York,  
as Trustee under The Indianapolis Gas Company  
Mortgage dated October 1, 1902

11 Broad Street  
New York, New York

Dear Sirs:

The undersigned are the owners and holders of \$150,000 principal amount of Indianapolis Gas Company First and Consolidated Mortgage Five Per Cent Gold Bonds due October 1, 1952 and outstanding under the above described Mortgage.

“(Here follow 7 paragraphs which are identical with the last 7 paragraphs in Plaintiffs' Exhibit 125.)”  
(Inserted pursuant to stipulation filed November 22, 1939.)

1257 Date: April 17, 1936.

Very truly yours,  
New England Mutual Life Insurance  
Company

By: J. A. Barbey  
*Vice-President.*

Attest:  
Morris P. Capen  
*Secretary.*

The following numbers are the bonds held by us:  
1008/20, 1136/50, 1299/1314, 1317/22, 1323/36, 1445/50,  
1551/4, 2487, 2875/8, 3205/17, 3782/9, 4383/81, 4439,  
4485/90, 4873/6, 4917, 5178/87, 6255/79.  
1258-1271

(PLAINTIFFS' EXHIBITS 127, 128, 128A, 128B, 129 and 130 omitted pursuant to stipulation filed Nov. 22, 1939.)

1272                      PLAINTIFFS' EXHIBIT 131.

Citizens Gas and Coke Utility, Successor to Citizens Gas  
Company  
Majestic Building

Address all communications  
to the company

Telephone  
Riley 5421

Registered Mail Oct. 23, 1935 14
--

Indianapolis, Indiana  
October 21, 1935

The Chase National Bank  
11 Broad Street  
New York, N. Y.

Gentlemen:

We are inclosing eighteen (18) own coupons, maturing October 1, 1935, which were detached from Indianapolis Gas Company First Consolidated Mortgage Bonds.

Yours very truly,

Citizens Gas and Coke Utility  
F. G. Rastenburg,

*Acting Assistant Secretary.*

T

450—

1273

PLAINTIFFS' EXHIBIT 132.

Registered Mail May 4 1936 18
-------------------------------------

1004 Majestic Building,  
Indianapolis, Indiana,  
May 1, 1936.

The Chase National Bank,  
Trust Department,  
11 Broad Street,  
New York, N. Y.

Gentlemen:

We enclose 138 Coupons No. 67, April 1, 1936 clipped from the First Consolidated Mortgage Five Per Cent Bonds of this Company. These are treasury coupons which have been cancelled and are sent to you in order that you may complete the record of the April 1, 1936, bond interest.

Yours very truly,  
The Indianapolis Gas Company  
By Wm. J. Yule  
Wm J. Yule  
*Secretary.*

Acknowledged  
By WJY

1277

PLAINTIFFS' EXHIBIT 139.

Stipulation of Facts in the Todd Case.

This stipulation is copied on pages 186-248, inclusive, of the Record in the United States Circuit Court of Appeals for the Seventh Circuit in the case of Todd vs. Citizens Gas Company of Indianapolis, *et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

(Excerpts therefrom printed pursuant to Stipulation filed Nov. 22, 1939, are as follows:)

## PLAINTIFFS' EXHIBIT 139.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana

Indianapolis Division.

Newton Todd,	} In Equity No. 1191.
<i>Plaintiff,</i>	
<i>vs.</i>	
Citizens Gas Company, et al.,	
<i>Defendants.</i>	

## STIPULATION OF FACTS.

The parties hereto agree that for the purpose of the trial and final hearing of this case, the following facts, in addition to those admitted in the answers, are true. All parties reserve the right to object to the introduction of any part of this stipulation on any ground other than that the facts therein contained have not been established by the best evidence.

. . . . .

(2) (d). Plaintiff, Newton Todd, brought and has maintained this suit on behalf of himself and other holders of certificates issued by said Board of Trustees who may wish to join in this suit and contribute to the expense thereof, and plaintiff, Newton Todd, in this suit, is asserting what he claims are corporate rights and immunities of the Citizens Gas Company of Indianapolis. At the time of the commencement of this action and now, there were and are approximately 1400 persons who were the owners and holders of such Certificates issued by said Board of Trustees, and in whose name stock certificates were issued by Citizens Gas Company as aforesaid. Plaintiff, Newton Todd, asserts in this suit that rights guaranteed by the Constitution of the United States to Citizens Gas Company and to him and other holders of certificates issued by said Board of Trustees, are being violated by acts of the defendants, under color of certain statutes of the State of Indiana, and seek to enjoin such acts and asks for a decree quieting title of the Citizens Gas Company to certain real and personal property situated within the Southern District of Indiana. The claims



of the plaintiff, Newton Todd, with respect to the violation of his constitutional rights and those of other holders of Certificates issued by said Board of Trustees and of the Citizens Gas Company are denied by the defendants.

. . . . .

4. Defendant Citizens Gas Company of Indianapolis, during its corporate existence, has acquired title to and is now the owner of certain real estate, together with the buildings, fixtures, machinery and equipment used and useful for the manufacture, storage and distribution of artificial gas and the by-products thereof, together with pipe lines, mains and other equipment necessary for distributing artificial gas in the City of Indianapolis, and also a manufacturing plant and ovens for the production, manufacture and sale of commercial coke. Said real estate is situated in the City of Indianapolis, Marion County, State of Indiana, and within the jurisdiction of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and said property, so situated, is correctly described in Paragraph IV of the Bill of Complaint.

Defendant Company owns all of the capital stock of Milburn By-Products Coal Company, a corporation, which has acquired title to and now owns certain leasehold rights in coal lands located in the Counties of Raleigh and Fayette, in the State of West Virginia, used and useful for the purpose of mining and producing therefrom coal for use in the operation of the business of defendant Company which leaseholds are those referred to in Paragraph VI of the bill of complaint. Defendant Company also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company, as created by a certain contract of lease for ninety-nine years dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana.

Said Indianapolis Gas Company was organized as an Indiana corporation for the purpose of furnishing artificial gas in the City of Indianapolis on the 10th day of January, 1881, and continued actively in business, until the execution of the lease aforesaid, under a franchise granted to its predecessor in title by ordinance of the City of Indianapolis on the 3rd day of April, 1876. On

the 7th day of October, 1913, said Indianapolis Gas Company surrendered said Franchise in accordance with the provisions of the Shively-Spencer Utility Commission Act described in Stipulation 10 hereof, and in lieu thereof accepted an Indeterminate Permit. Said Indianapolis Gas Company now owns, subject to said lease, the legal title in 518.10 miles of gas mains and pipes in the central portion of the city, and said Citizens Gas Company now owns 328.85 miles of gas mains and pipes within such city.

5. This suit is not a collusive one to confer jurisdiction on a court of the United States of a suit of which it would otherwise not have cognizance.

6. On the 25th day of August, 1905, the Common Council of the City of Indianapolis passed an ordinance ratifying, confirming and approving a certain Franchise Contract executed on the 25th day of August, 1905 by and between the Board of Public Works of said City, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, contracting for themselves and their associates and assigns, which said ordinance was approved by the Mayor of said City and became effective on the 30th day of August, 1905. Said Franchise Contract and Ordinance ratifying the same are correctly set out in Paragraph VI of the Bill of Complaint.

. . . . .

8. On the 24th day of May, 1906, the said Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt, who were the parties named in the Franchise set out in Stipulation 6 hereof, assigned and transferred to the defendant, Citizens Gas Company of Indianapolis, all of their rights in the aforesaid Franchise Contract, which assignment was accepted by the defendant company, and said defendant company continuously thereafter operated under said Franchise until it surrendered the same as hereinafter stated, and said defendant has had no other franchise granted by the City of Indianapolis.

. . . . .

Said company is to be formed on the plans set forth in said franchise for the protection of the public interests, with authority to pay its stockholders dividends of 10% per annum payable semi-annually.

(9. (a)) Said company is to accept and operate under said franchise, and may acquire, through the city or by

purchase, the pipe lines and other property lately operated by the Consumers Gas Trust Company in said City.

(d) Some subscriptions were also received in consideration of making extensions of the gas mains to reach the property of certain subscribers, which subscriptions were accepted on condition that enough subscriptions be obtained to warrant the proposed extensions. Such subscriptions were taken on a form which is as follows:

"Subscription to Stock of Citizens Gas Company of Indianapolis. Temporary Office 1201 Law Building. New Phone 361.

Trustees

Directors

I hereby subscribe for and agree to take \_\_\_\_\_ shares (par value \$25.00 each) of the capital stock of the Citizens Gas Company of Indianapolis, and to pay for the same at the rate of \$25.00 per share to the Union Trust Company of Indianapolis, Trustee for said Citizens Gas Company as follows: 10 per cent on demand, and 20 per cent on the 10th day of each month thereafter (except that the last payment shall be 30 per cent) until the full amount of said subscription shall have been paid.

All money paid on this subscription shall be held by the Union Trust Company, Trustee, until the first instalment of 10 per cent shall have been paid on not less than \$500,000 of subscriptions; but if for any reason such instalment shall not be paid by October 31, 1906, then the full amount of money paid on this subscription shall be returned to subscriber by said Union Trust Company Trustee.

"I hereby agree that the stock above subscribed shall be issued to a board of five trustees, named in the articles of incorporation of said company, in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the articles of incorporation under which said company is formed; and that when the indebted-

edness of said company is fully paid, and the subscribers shall have received an amount equal to the amount by them subscribed and paid, with dividends equal to 10% per annum, then the trustees and directors shall execute proper instruments transferring all the property of said company of every kind and description, to the city of Indianapolis: and that thereupon all my interest in said company and all its property shall thereby be cancelled, released and extinguished."

Name .....

Address .....

Date.....

Oct. 30, 1907

Pay no money to solicitors."

• • • • •  
13. At the Seventy-sixth General Assembly of the State of Indiana, held during the early part of the year 1929, there was adopted a bill which was published as Chapter 78, pages 268-271, Acts 1929, the title of which is as follows:

"A Bill for an Act relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporations to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency."

Said bill prepared by the legal department and special counsel of the City of Indianapolis employed for the purpose of bringing about a transfer of the plant and property of the defendant, Citizens Gas Company of Indianapolis, to the City of Indianapolis; said bill was introduced in the House of Representatives of the General Assembly by members residing in the City of Indianapolis and elected from Marion County and was passed in the exact form prepared and submitted by said counsel for the defendant City without change or amendment of any kind

or character. Said bill contained an emergency clause providing for its taking effect immediately upon its passage, was approved on the 11th day of March, 1929, and, so far as it was valid, became a law on said day.

14. On the 20th day of March, 1929, the defendant City of Indianapolis, acting only by and through its Board of Public Works, but without any action thereon by its Common Council and without an election thereon by the qualified voters of said City, passed a resolution asserting a right to acquire the plant and property of the defendant, Citizens Gas Company of Indianapolis. Said resolution is correctly set out in Paragraph XIV of the Bill of Complaint. Defendant City of Indianapolis served said resolution upon the defendant Citizens Gas Company of Indianapolis, its directors and trustees, on said 20th day of March, 1929. Defendant City of Indianapolis through its agents and employees, on said 20th day of March, 1929, served a copy of said resolution upon the defendants Citizens Gas Company of Indianapolis, its officers, the members of its Board of Directors and the members of its Board of Trustees.

\*     \*     \*     \*     \*

19. After the passage of the ordinance of August 30, 1905 and the incorporation of the Citizens Gas Company on May 23, 1906, the City of Indianapolis took no affirmative steps in its own behalf in connection with the taking over of the property of the Citizens Gas Company until the 20th day of March, 1929. Defendant City of Indianapolis has not proceeded under the terms of said Shively-Spencer Utility Commission Act in making its aforesaid demand, and the Public Service Commission of Indiana has neither ordered nor approved the acquisition by defendant City of said plant and property nor determined the value of said plant and property nor fixed the terms and conditions of said acquisition.

20. At no time has the question of the acquisition of the plant and property of defendant, Citizens Gas Company of Indianapolis, by defendant City been submitted to the qualified voters of said City at a special or general election.

21. The directors of the defendant company have caused the two resolutions set out in Stipulation 15 hereof to be printed and mailed to all holders of certificates issued by said Board of Trustees of the Citizens Gas Com-

pany, including plaintiff; said resolutions Nos. 1 and 2 have been published in the newspapers of Indianapolis and elsewhere and said directors have publicly expressed their intention of acceding to the demands of the defendant City and of conveying the plant and property of the defendant company to the City in accordance with the notice, resolution and demand set out in Stipulation 14 hereof. The directors and trustees of the Citizens Gas Company intend to and will carry out their expressed intention and will convey said plant and property of the defendant company pursuant to said demand by the defendant City unless enjoined and restrained from such action.

. . . . .

By agreeing to the statements contained in the above stipulations, the parties hereto are not agreeing as to any legal rights resulting therefrom, and in particular are not agreeing as to the rights flowing to plaintiff and other holders from the issuance of the certificates in the forms set forth in Stipulations 2(b) and 2(c) hereof, nor as to the relation to the Citizens Gas Company of plaintiff and others to whom such certificates were issued; but said legal rights and relation are to be determined by the facts set forth in these stipulations and the facts proved at the trial and the law applicable thereto. Any party to this cause shall have the right at the final hearing to introduce any additional or further evidence in this cause, providing that the same is not in contradiction of any of the facts herein stated.

Frederick L. Matson,

Earl B. Barnes,

Austin V. Clifford,

*Attorneys for Plaintiff, Newton Todd.*

Edw. H. Knight,

John W. Holtzman,

Fred C. Gance,

*Attorneys for City of Indianapolis;  
Reginald Sullivan, as Mayor of the  
City of Indianapolis, Henry O. Goett,  
as City Clerk of the City of Indian-  
apolis, and E. Kirk McKinney, Louis  
G. Brandt and Charles O. Britton,  
as and constituting the Board of  
Public Works of the City of Indian-  
apolis.*



Thompson, Rabb & Stevenson,  
Smith, Remster, Hornbrook & Smith,

*Attorneys for Citizens Gas Company of Indianapolis, John R. Welch, Gustav A. Efroymsen, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette, Edgar H. Evans; Gustav A. Schnull, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Otto Lieber, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Frank C. Dailey, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Thomas L. Sullivan, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Henry Kahn, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis.*



## PLAINTIFFS' EXHIBIT 135.

(Excluded by District Court.)

No. 26163.

IN THE SUPREME COURT OF INDIANA.

To May Term, 1932.

Appeal From the Superior Court of Marion County.

Allen G. Williams,  
*Appellant,**vs.*Citizens Gas Company of Indianapolis, *et al.*,  
*Appellees.**Appellees' Brief.*James M. Ogden,  
*Attorney General of Indiana,*George W. Hufsmith,  
*Deputy Attorney General,*  
*For Appellees John W. McCardle et al.*Edward H. Knight,  
*Corporation Counsel,*James E. Deery,  
*City Attorney,*

William H. Thompson,

Albert L. Rabb,

Thomas D. Stevenson,

*Attorneys for Appellees City of*  
*Indianapolis, et al.*

Louis B. Ewbank,

Samuel Dowden,

*Attorneys for Appellees Indianapolis*  
*Gas Company, et al.*

Charles Remster,

Henry H. Hornbrook,

Albert P. Smith,

Paul Y. Davis,

Kurt F. Pantzer,

Ernest R. Baltzell,

*Attorneys for Appellees Citizens*  
*Gas Company, et al.*

• • (Caption—26163) • •

**APPELLEES' BRIEF.**

The ninety-eight pages of mingled argument and discursive statement following the title "Nature of the Action" in appellant's brief invite and justify the following re-statement of the

**Nature of the Action.**

This is a suit whereby appellant suing as an inhabitant and taxpayer of the City of Indianapolis on behalf of himself and other inhabitants and taxpayers of the city asks that it be decreed that a public charitable trust exists in the property of Citizens Gas Company of Indianapolis; alleges that a conspiracy was formed in 1913 to destroy the public charitable trust existing in the property of the Citizens Gas Company of Indianapolis and alleges as the overt acts in this conspiracy the enactment of the Shively-Spencer Act creating the Public Service Commission of Indiana, the approval by that Commission of a lease of property of the Indianapolis Gas Company to the Citizens Gas Company, the payment of millions of dollars under such lease, the surrender by the Citizens Gas Company of its franchise and its acceptance of an indeterminate permit, its obtaining various orders from the Public Service Commission of Indiana, and its obtaining a decree from the United States District Court at Indianapolis enjoining the enforcement of confiscatory rates. The relief sought is not only a declaration that a public charitable trust exists in the property of the Citizens Gas Company, but an adjudication that the Shively-Spencer Act is void and that every order of the Public Service Commission of Indiana affecting in any manner the Citizens Gas Company is void; that the lease between the Indianapolis Gas Company and the Citizens Gas Company is void notwithstanding its approval by the Public Service Commission; that the Indianapolis Gas Company be declared insolvent and the Citizens Gas Company be declared insolvent or in imminent danger of insolvency and a receiver appointed for such companies; that the several millions of dollars paid by Citizens Gas Company under such lease be repaid to it; that the assets of the Citizens Gas Company be administered by such receiver; that the public charitable

trust on behalf of the inhabitants and taxpayers of said city of Indianapolis be preserved and enforced; that the directors and trustees of the utility district of Indianapolis be enjoined from acting as such; and that the Mayor, the defendants, city officials, Gas Company officers and others be enjoined from conspiring to "defeat said public charitable trust."

Propositions, Points, And Authorities By Which Appellant's Alleged Errors Are Met Or Obviated And The Judgment Sustained.

### A and B.

No Reversible Error Can Be Predicated on the Ruling of the Lower Court in Striking Out From the Complaint Averments With Respect to an Alleged Conspiracy for The Enactment of the Shively-Spencer Public Utility Act for the Reason That Such Averments Are Irrelevant Beyond Possibility of Amendment Because There Is Not In Law Any Such Thing as a Conspiracy to Bring About the Enactment of a Valid Statute.

. . . . .

### C.

The Demurrer of Appellees Citizens Gas Company et al. to Appellant's Complaint Was Correctly Sustained by the Lower Court for the Reason That the Complaint Is Insufficient for Want of Facts in That Appellant as an Individual Member of the Public or as a Taxpayer Has No Right as Such to Maintain an Action to Enforce a Public Charitable Trust and No Right to Injunctive Relief Is Shown, No Right to a Receivership, and No Clouds Upon the Title of the Public Charitable Trust Appear.

. . . . .

This Suit Is of Such Nature That It Cannot Be Maintained by an Individual Member of the Public.

3. Appellant sues only as an "inhabitant and taxpayer" of appellee City of Indianapolis, and on behalf of himself and of other inhabitants and taxpayers of the city, but neither he nor any other inhabitant has any separate

or divisible interest in the public charitable trust that is the subject matter of this suit; he is not seeking to assert rights that public officers have refused to assert; and he has no right to maintain this suit.

*State ex rel. v. Holt*, 163 Ind. 198, 200.

6. A public charitable trust in the property of Citizens Gas Company was created by its organization under conditions that when the subscribers to its stock have been repaid par plus interest, its property should be conveyed to the city. That the trust is a charitable one appears from the fact that the public will receive the property of the Gas Company without having to purchase it. That the trust is a public one is manifested from the fact that the beneficiaries, i. e., the inhabitants of the City of Indianapolis, are an indefinite and unascertained class.

*Todd v. Citizens Gas Co.*,

*Cotter v. Same*,

42 Fed. (2nd) 85, (C. C. A. 7).

7. A suit to enforce a public charitable trust can not be maintained by an individual member of the public such as appellant. The exclusive right to maintain such a suit is in the appropriate law officer of the public. The reasons are clear: not only has an individual no definite or separable interest in the trust, but for an individual either as sole plaintiff or in the guise of a class suit, to assume the duty of litigating on behalf of the public would infallibly subject the trust to embarrassment, confusion, loss and damage.

*Stearns v. Newport Hospital*, 27 R. I. 309, 62 Atl. 132;

*Burbank v. Burbank*, 152 Mass. 254, 25 N. E. 427;

*Barker v. Hauberg*, 325 Ill. 538, 156 N. E. 806;

*Gibson v. Frye Institute*, 137 Tenn. 452, 193 S. W. 1059;

*Dillaway v. Burton*, 256 Mass. 568, 153 N. E. 13;

*Wemme v. Noyes*, 294 Pac. 602 (Oregon).

No Right to Receivership Is Shown.

15. The lease between said companies is alleged to be invalid. But it was approved by the Public Service Commission of Indiana, under express authorization of Section 95 of the Shively-Spencer Public Utility Act. After this very lease had been so approved, an action was brought by a taxpayer to vacate the order of approval; judgment was entered against such plaintiff; and an appeal therefrom was dismissed: *Fishback v. Public Service Commission*, 193 Ind. 282. This approval of this lease cannot now be collaterally attacked.

*Public Service Commission v. Indianapolis*, 193 Ind. 37.

• • • • •

18. A lessee of property of which it has held possession and from which it has taken the income as such lessee for seventeen years cannot, nor can anybody claiming through or under such lessee, attack the validity of the lease under which it took and has continued to hold the same, without surrendering such possession, and without accounting for nor offering to account for and restore the income so received. Even if appellant had the right to maintain an action to set aside the lease of the Indianapolis Gas Company's property (which is denied) because of fraud, and even if facts alleging actionable fraud were alleged (and they are not), the action must fail for want of an offer to surrender the leased premises and to restore the consideration received thereunder.

*Ashmead v. Hurt*, 125 Ind. 566, 568;

*Callahan v. Dunker*, 51 Ind. App. 436, 445;

*Deford v. Urbain*, 48 Ind. 219, 221;

*Anchor Ins. Co. v. Meyer*, 61 Ind. App. 35, 41;

*Westhafer v. Patterson*, 120 Ind. 459, 462;

*South Bend, etc., Gas Co. v. Jensen*, 182 Ind. 557, 560.

19. The lapse of seventeen years without action by the inhabitants and taxpayers of Indianapolis to challenge the validity of the lease is such laches as to preclude the granting of the relief here prayed.

*Sinclair v. Guzenhouser*, 179 Ind. 78, 131;

*Ryason v. Dunten*, 164 Ind. 85, 94-97;

*Turpie v. Lowe*, 158 Ind. 314, 320, 322.

No Clouds Upon Title of Property in the Public Charitable Trust Are Shown.

20. The facts alleged as basis for the appointment of a receiver for the property of appellee Citizens Gas Company are also alleged to be clouds upon the title of the property subject to the public charitable trust existing in that property. For the same reason they are not and cannot be clouds upon title. It is additionally alleged that the surrender of its franchise by the Citizens Gas Company is a cloud upon title of such trust. But this contention is forever quieted by the final judgments in the cases of *Todd and of Cotter, et al. v. Citizens Gas Company, City of Indianapolis, et al.*, hereinbefore referred to, which have finally established the existence and validity of the public charitable trust in the property of Citizens Gas Company notwithstanding the surrender of its franchise.

*Todd v. Citizens Gas Co., Cotter v. Stone*, 46 Fed (2nd) 855 (C. C. A. 7; Cert. den. 283 U. S. 852).

. . . . .

22. Appellant also asserts that the Federal Court proceedings were void as to the public charitable trust because the trust was not represented. But the Citizens Gas Company was the Trustee of the public charitable trust. Its presence in that litigation and its action therein was not in derogation of the trust, but on behalf of the trust. Beneficiaries of an express trust are in court whenever the trustee is in court.

*Hord, Trustee, v. Bradbury*, 156 Ind. 30, 33.

. . . . .

D.

The Demurrer of Appellees Indianapolis Gas Company, Ferdinand Winter, and Trust Company of America, Was Correctly Sustained to Appellant's Complaint for the Reason That the Complaint Is Insufficient for Want of Facts in That Appellant as an Inhabitant or Taxpayer Is Not a Real Party in Interest, No Right to Injunctive Relief Is Shown, and No Right to a Receiver Appears.

. . . . .

## E.

The Demurrer of Appellees John W. McCardle et al. as the Public Service Commission of Indiana Was Correctly Sustained to Appellant's Complaint for the Reason That the Complaint Was Insufficient for Want of Facts in That Their Official Acts Were Performed in Good Faith Within the Scope of Valid Statutes and Cannot Here Be Collaterally Attacked.

. . . . .

## F.

Appellant's Motion to Vacate the Rulings to Strike Out Parts of the Complaint, etc., Presents No Reversible Error Because Error Has Been Assigned Directly Upon the Rulings Themselves; and the Basis Asserted for the Motion, viz., the Pendency of Demurrers, Is Contradicted by the Record.

. . . . .

## ARGUMENT.

Appellant, suing as an inhabitant and taxpayer of the City of Indianapolis, on behalf of himself and other inhabitants and taxpayers of the City, seek a decree declaring that a public charitable trust exists in the property of Citizens Gas Company of Indianapolis, notwithstanding the final adjudication to that effect in Todd and Cotter cases against the City and the Gas Company (46 Fed. 2nd, 855; 283 U. S. 852); that the Shively-Spencer Public Utility Act creating the Public Service Commission of Indiana is void, notwithstanding the repeated recognition this Court has given to the validity of that statute; that the lease between the Citizens Gas Company and the Indianapolis Gas Company is void, notwithstanding its approval both by the Commission and in litigation (*Fishback v. Public Service Commission*, 123 Ind. 282); that all the moneys paid by the Citizens Gas Company under such lease should be repaid to it, irrespective of the benefits the Citizens Gas Company obtained by such payments; that because of such payments the Citizens Gas Company is insolvent or in imminent danger of insolvency and a receiver should be appointed for it and its assets administered by such receiver "that said public charitable trust in behalf of the inhabitants and taxpayers of said city of Indianapolis may be preserved and enforced," notwithstanding the fact that no public officer has been requested to bring such a suit.

. . . . .



**This Suit Is of Such Nature That It Can Not Be Maintained by Appellant as an Individual Member of the Public.**

The conspicuous feature of this litigation is that appellant as plaintiff, an individual inhabitant and taxpayer, has constituted himself the sole vindicator of the rights of the public in a public charitable trust to the exclusion of the public officials charged with such duty.

The facts pleaded in the complaint show that a public charitable trust exists in the property of appellee Citizens Gas Company of Indianapolis. Suffice it to say that a public charitable trust was thus created by the organization of the Citizens Gas Company with provisions in its articles of association that all rights of that company and of the subscribers to its capital stock should terminate when the latter had been repaid par plus specified interest and that thereupon the property should be conveyed to the city. The trust res is the plant and property of the Citizens Gas Company. The settlors of the trust were the subscribers to its capital stock, as well as the individuals who obtained and assigned a franchise to the Company. Their charitable purpose is manifest from the express limitation of all participation by certificate holders in profits and assets to such repayment of par plus interest, with the result that the public will receive the plant and property without the necessity of purchasing the same. The indefinite and unascertained class of beneficiaries—typical feature of a public charitable trust—consists of the inhabitants of Indianapolis.

This is not a case where moneys paid by appellant for taxes have been or are about to be expended in a matter considered by him to be illegal. He asserts that he is one of the class "who furnished the funds with which to repay the persons who supplied the money used in the construction and acquisition of the trust property". (Appellant's Brief, pp. 257, 259.) But the complaint refutes this assertion. Appellant is not shown to be a consumer of gas. The pleaded franchise contract shows conclusively that the subscribers to the capital stock of the Gas Company (often referred to as certificate holders because the stock was assigned to trustees who issued trustee's certificates to the subscribers) are to be repaid the par value of their stock plus stipulated interest out of earnings, and if not out of earnings, then out of the proceeds of a mortgage to be placed upon the property. No taxes are to be used for the

acquisition of such property by the public. Indeed, as the Circuit Court of Appeals stated, 46 Fed. (2nd) 855, 866, the franchise

"could not be regarded as a purchase in 1905 or a contract for a purchase. It was an agreement by which the city obtained an interest in the plant subject to the charge in favor of the certificate holders. No funds of the city were paid or contracted to be paid for the plant."

It follows that the cases relied upon by appellant, which pertain to proceedings by taxpayers to enjoin the expenditure of taxes about to be illegally expended, or to recover taxes illegally diverted, are not in point. Nor can it be any proper ground of apprehension by appellant that moneys to be raised by taxation may be expended for debts of the Citizens Gas Company. No such intent is alleged. None is apparent. The right of the City of Indianapolis to accept public trusts (Clause 6, paragraph 53 of Section 10284, Burns' 1926) is not limited to unencumbered property. That a city takes property subject to debts does not make those debts the city's debts.

*Fox v. City of Bicknell*, 193 Ind. 537.

The unescapable truth is that appellant solely as an individual member of the public arrogates to himself the right by litigation to control the management of such trust to the exclusion of the officials of the public. But the rule is thoroughly settled that an individual member of the public has no right as such to maintain an action to enforce or protect a public charitable trust.

We submit that the Attorney General of Indiana and/or the Prosecuting Attorney for the Nineteenth Judicial Circuit at all times had and have the exclusive right as against individual inhabitants such as appellant, to bring suit to enforce and protect the public charitable trust in the property of Citizens Gas Company of Indianapolis; from which it follows that appellant had no standing in court to maintain this action and his complaint is insufficient for want of facts.

#### No Right to Equitable Relief Is Shown.

Even if appellant as a private citizen, taxpayer, or inhabitant, having no separate or divisible interest in the subject matter of the public charitable trust, nevertheless could maintain an action to enforce it without respect to the rights or duties of the public officers, yet his complaint is in no respect sufficient to state a cause of action.

1. But the complaint does not allege that plaintiff is a stockholder or a creditor of either the lessor Indianapolis Gas Company or the lessee Citizens Gas Company, or that either company owes a debt to anybody not amply secured, or owes any debt at all to the City of Indianapolis, of which city he is an inhabitant and taxpayer; there is no averment as to the value at this time of the property leased by the Indianapolis Gas Company to the Citizens Gas Company, nor of its value at any time since the year 1913, when the lease was executed, seventeen years before suit was commenced.

2. The complaint does not allege that the Citizens Gas Company ever acquired or owned any plant or gas mains or property other than the plant, real estate and 375 miles of gas mains leased to it by the Indianapolis Gas Company (Appellant's Brief, pp. 158, 161 to 168), with extensions of and betterments to the same, paid for by the sale of mortgage bonds of said lessor (Appellant's Brief, p. 192), except only as an inference might be drawn that it acquired 100 miles of gas mains in 1906, to comply with the condition in its city franchise that it have that amount of mains (Appellant's Brief, p. 120), which franchise was assigned to it in 1906 (Appellant's Brief, p. 137); and does not intimate that the Citizens Gas Company had any source of income from which to make the alleged payments of rentals, interest and taxes except out of such income from operation of the leased property.

3. The complaint does not allege that the stockholders of the Citizens Gas Company nor any of them have ever been repaid, from savings or otherwise, amounts equal to the face value of their certificates of stock, with interest thereon at the rate of 10% per annum, as provided in the franchise and articles of association (Appellant's Brief, pp. 119, 125, 136), to give any right to a conveyance of its property to the city "to be owned and operated or leased by it"; nor does it even aver that any dividends whatever ever were paid by said lessee company to its stockholders, or that it ever earned any income whatever from which to pay dividends. The averments that the lessee, Citizens Gas Company, took subscriptions for and sold its capital stock (Appellant's Brief, pp. 138, 145), that its franchise was amended so as to authorize the mortgage of its property to secure bonds it might issue (Appellant's Brief, pp. 149-151), and that it "acquired property of great value" (Appellant's Brief, pp. 151, 152), are not supplemented by the suggestion that it ever had any earnings or income, or

ever repaid anything to investors, either of dividends or amounts invested; the averred conclusion of law "that there has been a substantial performance of all conditions precedent to the changing of said inchoate trusteeship into an active trusteeship on the part of said municipal city of Indianapolis" (Appellant's Brief, p. 144), and the fact that the Citizens Gas Company "has laid out and expended of the moneys, funds and property of the taxpayers of said city (of Indianapolis) \* \* \* a large sum" (Appellant's Brief, p. 200), not amounting to allegations that the company earned an income from property other than what was leased—or from it, either—or that it paid dividends or repaid its mortgage loans, or reimbursed investors, so as to require a conveyance to the city as trustee.

4. The complaint does not allege anything as to the income which the lessee has drawn from the leased gas plant embracing 375 miles of gas mains and extensions (now totalling in excess of 500 miles) during the 17 years it had held possession and operated same when this action was commenced, and had paid the rentals, interest and taxes complained of.

5. The complaint does not deny that the provisions of the lease authorizing the lessee Citizens Gas Company to take down and sell bonds of the lessor secured by the mortgage attacked, in such amount that the proceeds when sold at 85% of the face will pay "the total cost of such extensions or betterments" (Appellant's Brief, p. 192), has been fully carried out as to all extensions and betterments made, the only averment in relation thereto being that "the said Citizens Gas Company has well and truly performed all the obligations imposed upon it by said pretended lease" (Appellant's Brief, p. 200).

6. The complaint does not allege that the lessee had surrendered possession of the leased property, nor returned the income which it received therefrom during the seventeen years that possession was held, nor contain any offer to surrender possession or to pay for the use of the leased property during those seventeen years, nor any offer to return or to account for such income or any part of it.

7. The complaint, filed in March, 1930, does not allege facts tending to constitute any cause for challenging the validity of the mortgage given by the Indianapolis Gas Company October 1, 1902 (Appellant's Brief, pp. 173, 203), to secure \$7,500,000.00 of bonds, nor the lease by that company to the Citizens Gas Company of September 13, 1913 (Appellant's Brief, p. 165), expressly made subject to said

mortgage (Appellant's Brief, pp. 173, 192, 193), which has not existed during the entire seventeen years that the Citizens Gas Company has continued to hold and occupy under the lease.

• • • • •

It is elementary that any suit seeking rescission of an executed contract must involve at least an offer to restore the received consideration, or to account for it. But appellant ignores the transactions of seventeen years during which the Citizens Gas Company has openly held possession of the leased property and seeks to wipe out the very existence of the lease without any regard to the equities of the interested parties. Yet that lapse of time constitutes such laches as to preclude equitable relief.

The lease is fair upon its face. There is no suggestion that the agreed rental is disproportionate. The lease was made as a result of proper corporate action. It had the considered approval of the Public Service Commission of Indiana. It follows that this suit, to adopt the words of this Court in *Public Service Commission v. City of Indianapolis*, 193 Ind. 37, 42-43,

"is a collateral attack upon the action of the commission, and can only succeed in case the order was wholly void, either because of fraud which entered into it, or because the commission was without jurisdiction or exceeded its jurisdiction in making such order."

There is not a single fact alleged in the complaint showing that fraud induced or vitiated the order of the Commission. There was no excess of jurisdiction, because Section 95 of the Shively-Spencer Public Utility Act is an express grant of authority to the Commission for the approval of leases of such nature. Appellant vigorously attacks the constitutionality and validity of the Act. There is no need to debate such questions at this time. This Court has repeatedly recognized the Act as legal. The action of the Commission upon this very lease has been upheld judicially: *Fishback v. Public Service Commission*, 193 Ind. 282.

It thus appears that the alleged insolvency that is the apparent basis of the request for the appointment of receivers rests in appellant's conception that practically everything that has occurred from the organization of the Indianapolis Gas Company to and including the passage of the legalizing Act of 1929 is null and void; and particularly that there must be a repayment by the Indianapolis



Gas Company to the Citizens Gas Company of moneys paid as rental under a lease lawfully approved by a legally constituted tribunal and sanctioned by the final judgment of a court of competent jurisdiction with respect to property of which the Citizens Gas Company has had the continuous benefit for some seventeen years. In short, appellant desires to substitute his opinion as to the validity of the lease for that of the two companies, of the Commission, and of the Court. In other words, no ground whatever is shown for the appointment of a receiver.

The first prayer of the complaint is that the existence of a public charitable trust in the property of Citizens Gas Company for the benefit of the inhabitants of Indianapolis be adjudged. (Appellant's Brief, p. 221.) Prayer and suit are unnecessary. There has been a final decision by a court of competent jurisdiction forever establishing the existence of such a public charitable trust: *Todd v. Citizens Gas Company et al.*; *Cotter v. same*; 46 Fed. 2nd. 855, 283 U. S. 852. The City of Indianapolis was a party to such litigation, and therefore every one of its citizens and inhabitants is bound thereby. *Heckman v. United States*, 224 U. S. 413, 445, 56 L. ed. 820, 833. The existence and validity of the public charitable trust having thus been finally adjudicated, neither appellant nor any other inhabitant of the City may relitigate these questions in this or any other court. *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195. The effect of these decisions cannot be avoided by characterizing the demurrers to the complaint as "speaking demurrers." Appellant himself by his supplemental complaint refers to the decisions and shows that he was restrained from litigating during the pendency of such cases. His statement that the final disposition by the Supreme Court of the United States of those cases absolves him of any restraint is of course a conclusion of law and of no effect. Appellant's assertions of what the law is are of no weight; the court knows and takes judicial notice of the law without the necessity of pleading. The allegations of the complaint pertaining to the alleged conspiracy to defeat the establishment of the public charitable trust are therefore stultified, and appellant's prayer for a declaration of the existence of such trust and equitable aid in support thereof are to be disregarded.

**Conclusion.**

Appellant's suit professes to be in the public interest. But no one is helped, and nothing is proved, by vague though voluminous accusations of fraud and conspiracy to defeat the very public charitable trust in the property of Citizens Gas Company of Indianapolis whose existence and validity have been fully, fairly, and finally determined by a court of competent jurisdiction. It is hardly in the public interest to seek to wrest from public officials by means of private receivership proceedings the control of a public charitable trust with which they are charged. It would be a most mischievous precedent that a public charitable trust is to be enforced according to the views, not of the law officers of the public, but of any private individual who desires to arrogate his opinion over that of the public. And certainly it is not in the public interest to hinder and delay the performance of such trust by litigation such as this; and this suit could have no other effect.

We ask that the judgment of the lower court be forthwith affirmed.

Respectfully submitted,

**Edward H. Knight,**

*Corporation Counsel.*

James E. Deery,

*City Attorney,*

William H. Thompson,

Albert L. Rabb,

Thomas D. Stevenson,

*Attorneys for Appellees City of Indianapolis in the State of Indiana, a Municipal Corporation, Reginald H. Sullivan, as Mayor of said City of Indianapolis, Henry O. Goett, as City Clerk of said City of Indianapolis, E. Kirk McKinney, Louis C. Brandt, Charles O. Britton, as the Board of Public Works of said City of Indianapolis, Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis, Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elselv, Atmus G. Ruddell and Guy A. Wainwright, as the Board of Directors for Utilities of said City of Indianapolis.*



James M. Ogden,

*Attorney General of Indiana,*

George W. Hufsmith,

*Deputy Attorney General,*

*For Appellees John W. McCordle, Francis T. Singleton, Howell Ellis, Calvin F. McIntosh and Jere West as the Public Service Commission of Indiana.*

Charles Remster,  
Henry H. Hornbrook,  
Albert P. Smith,  
Paul Y. Davis,  
Kurt F. Pantzer,  
Ernest R. Baltzell,

*Attorneys for Appellees Citizens Gas Company of Indianapolis, a corporation, Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymsen, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg and Paul E. Crosier.*

Louis B. Ewbank,  
Samuel Dowden,

*Attorneys for Appellees Indianapolis Gas Company and*

*Ferdinand Winter and Trust Company of America as Trustees under a mortgage executed by said Indianapolis Gas Company.*

June 10, 1932.

1274-1275 • • • • •

(PLAINTIFFS' EXHIBITS 136, 137 and 138 omitted pursuant to stipulation filed Nov. 22, 1935.)

1278 CITY'S STIPULATION EXHIBIT 60.

September 9th, 1935.

Indianapolis Gas Company,  
1004 Majestic Building,  
Indianapolis, Indiana.

Gentlemen:

By request of the Board of Directors for Utilities of the City of Indianapolis, we hand you herewith certified copies of two resolutions today adopted by such Board, viz: one for rejection by the city of assignment of lease between your company and the Citizens Gas Company of Indianapolis and the other for temporary use of such property. We also hand you copy of a rejection of such assignment which has today been recorded in the office of the Recorder of Marion County, Indiana.

Very truly yours,  
Thompson Rabb & Stevenson.

1279 CITY'S STIPULATION EXHIBIT 61.

The Indianapolis Gas Company,  
1004 Majestic Building,  
Indianapolis, Indiana.

Gentlemen,—

Herewith we tender you the sum of \$171,575.00; which we understand is equivalent to the amount of interest due and payable upon your First Consolidated Mortgage Five Per Cent. Bonds on October 1, 1935.

This sum is tendered you as a payment on account of temporary use and occupancy of your property by the City of Indianapolis pursuant to the certain resolution, entitled "Resolution for Temporary Use of Property of The Indianapolis Gas Company" adopted by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, Indiana, on September 9, 1935;

a copy of which resolution was that day transmitted to you.

This sum is not tendered you under or on account of the certain lease between you and Citizens Gas Company of Indianapolis dated September 30, 1913, or any assignment thereof. The City of Indianapolis is not acting under said lease, or any assignment thereof, and has not recognized and does not recognize said lease as an obligation in any respect, either binding upon the City or upon any property acquired by the City from said Citizens Gas Company of Indianapolis.

Dated at Indianapolis, Indiana, September 24, 1935.

Board of Directors for Utilities of the  
City of Indianapolis

By Henry L. Dithmer,  
*President.*

1280 CITY'S STIPULATION EXHIBIT 62.

The Indianapolis Gas Company,  
1004 Majestic Building,  
Indianapolis, Indiana.

Gentlemen,—

Herewith we tender you the sum of \$4780.80, which we understand is equivalent to the amount of your third instalment of Federal Income tax for the year 1934 payable in 1935.

This sum is tendered you as a payment on account of temporary use and occupancy of your property by the City of Indianapolis pursuant to the certain resolution, entitled "Resolution for Temporary Use of Property of The Indianapolis Gas Company" adopted by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, Indiana, on September 9, 1935; a copy of which resolution was that day transmitted to you.

This sum is not tendered you under or on account of the certain lease between you and Citizens Gas Company of Indianapolis dated September 30, 1913, or any assignment thereof. The City of Indianapolis is not acting under said lease, or any assignment thereof, and has not recognized and does not recognize said lease as an obligation in any respect, either binding upon the City or upon

any property acquired by the City from said Citizens Gas Company of Indianapolis.

Dated at Indianapolis, Indiana, September 24, 1935.

Board of Directors for Utilities of the  
City of Indianapolis

By Henry L. Dithmer,  
*President.*

1281 CITY'S STIPULATION EXHIBIT 63.

September 27, 1935.

The Indianapolis Gas Company,  
1004 Majestic Building,  
Indianapolis, Indiana.

Gentlemen:

We have had no response from you to our repeated requests for an opportunity to negotiate a lease for the use of your property by the City of Indianapolis.

That there may be no misunderstanding of our position, we desire to obtain from you an agreement for the use of your property by the City of Indianapolis in connection with its operation of property acquired from Citizens Gas Company of Indianapolis, and upon terms that are both appropriate and fair. Therefore we have asked, and we now ask, that you inform us whether you are willing to undertake to negotiate such an agreement.

This is a matter not merely of private interest, but of public concern. While you have responsibilities to your security holders, we have responsibilities to our citizens. We seek no unfair advantage, and will take no arbitrary action; but we are determined that the interests of the community shall be protected so long as the service of gas is here confided to our care.

You have returned without explanation or comment checks that we sent you by way of compensation for temporary use of your property since September 9, 1935, the date upon which the City acquired the property owned by Citizens Gas Company; and we understand that by so doing you incur the risk of non-payment of your bond interest on October 1st as well as non-payment of certain taxes, with the consequent danger of a default in your mortgage bond obligations.

1282 To avoid such an unnecessary misfortune, we again offer you these sums, viz. \$171,575.00 and

\$4780.80. We waive no rights by making this offer; but we ask you to waive no rights of yours by an acceptance. You may take these payments without prejudice to your position and without qualification, save only that the City be not precluded, upon the ground that by making these payments it has recognized as binding upon it the obligations of your lease with Citizens Gas Company.

We consider the terms of your lease with the Citizens Gas Company are inappropriate and unfair to the City and to consumers of gas. We are willing to undertake to negotiate the terms of a new lease from you to the City that will be both appropriate and fair.

Are you willing to do the same?

Board of Directors for Utilities  
of the City of Indianapolis

By Henry L. Dithmer,  
*Its President per ALR.*

1283 CITY'S STIPULATION EXHIBIT 64.

September 30, 1935.

The Indianapolis Gas Company,  
1004 Majestic Bldg.,  
Indianapolis, Indiana.

Gentlemen:

We tender you herewith two checks, one in the sum of \$171,575 and the other in the sum of \$4780.80 which equal the amount of the interest on the mortgage bonds of The Indianapolis Gas Company for October 1, 1935, and its third instalment of Federal Income Taxes. In making this tender we do not agree that the lease executed between The Indianapolis Gas Company and the Citizens Gas Company under date of September 30th, 1913, is valid or enforceable against the City of Indianapolis, nor do we waive any rights by making this tender and payment, but we ask you to waive no rights of yours by accepting; and you shall be at full liberty to assert, as we understand you do, that said lease is an obligation binding on the City of Indianapolis.

We likewise offer to make all other payments stipulated in said lease for a period of six months from the 9th day of September, 1935, (the day upon which the property of the Citizens Gas Company was transferred to the City of Indianapolis) upon the same terms and conditions. We

will make these payments without prejudice to our position or rights and you may accept the same without prejudice to your position or rights and without qualification save only that it is agreed that by making all such payments the city has not recognized as valid or binding upon it the obligations of your lease with the Citizens Gas Company.

Very truly yours,  
Board of Directors for Utilities  
of the City of Indianapolis  
By Thompson Rabb & Stevenson,  
*Its Counsel.*

1284 . CITY'S STIPULATION EXHIBIT 65.

The Indianapolis Gas Company  
1004 Majestic Building  
Indianapolis, Indiana

Sept. 30, 1935.

Board of Directors for Utilities of the  
City of Indianapolis

Attention: Thompson, Rabb & Stevenson, Counsel

Gentlemen:

We are in receipt of your favor of today, September 30, 1935, enclosing two checks, with a stipulation which you expect us to join in, the substance of which we understand to be as follows:

That neither you nor we are waiving any rights which any of us may have previously had, or may claim, concerning the lease executed between The Indianapolis Gas Company and the Citizens Gas Company under date of September 30, 1913, you making these or future payments referred to without prejudice to your position or rights and we accepting the same without prejudice to our position or rights under said lease or in any relation thereto.

We expect to deposit said checks early tomorrow morning and if we have in any way misinterpreted your letter, please notify us immediately.

Very truly yours  
The Indianapolis Gas Company  
By Wm. J. Yule  
*Secretary.*

## 1285 CITY'S STIPULATION EXHIBIT 68.

October 10, 1935.

The Indianapolis Gas Company,  
1004 Majestic Building,  
Indianapolis, Indiana.

Gentlemen:

At a preliminary conference held Tuesday at the Columbia Club between representatives of your company and the Board of Directors of the Department of Utilities of the City of Indianapolis, at the request of that Board, I stated the principal objections which the City of Indianapolis has to the terms of the 99 year lease executed by your Company and the Citizens Gas Company on September 30, 1913. As I advised you, the objections stated are not to be considered as inclusive, because undoubtedly, if a new lease is to be executed, there are many provisions of the old lease, not discussed, which would need thorough consideration and substantial revision.

At your request, we summarize below the provisions of the lease of September 30, 1913, which in the opinion of the Board of Directors of the Utility Department are particularly burdensome:

1st. Subdivision 7 requires the Citizens Gas Company to refund the bonds secured by the mortgage executed by The Indianapolis Gas Company during the entire term of the lease. That section further provides:

"Should such refunding bonds be sold below par then the lessee shall pay any additional sum necessary to complete the payment of the outstanding bonds, and shall have no lien upon the property or charge against the lessor therefor \* \* \*"

1286 It is then provided that if the refunding bonds should be sold at a premium, the premium should belong to the Citizens Gas Company.

In substance, this is a guaranty that for a period of 99 years from September 30, 1913, the debt of The Indianapolis Gas Company will be refunded without expense to it.

It is probable that the mortgage debt would have to be refunded twice during the remaining 77 years of this lease and if, as is likely, the bonds should be sold below par this agreement imposes a very heavy financial responsibility.



2nd. Subdivision 14 of the lease requires the lessee during the entire continuance of the lease to pay all taxes of every nature and description not only on the property covered by the lease, but upon its earnings and the rental reserved "so far as the same may constitute the basis for an income tax." Under this provision of the lease, the Citizens Gas Company not only paid the local property taxes amounting to \$95,543.91 for the year 1934, but also Federal Income taxes and Indiana Gross Income taxes upon the rent. The amounts paid in 1934 for income taxes were slightly in excess of \$25,000 and if the present trend of taxation is continued this covenant would impose an increasing burden throughout the unexpired term of the lease.

3rd. Subdivision 15 of the lease contains a covenant that the Citizens Gas Company will, during the term of the lease, "renew, repair, replace and extend the same, so as to maintain and keep the demised premises in as good order, repair and condition as the same are now or may be put upon the completion of the construction contract hereinabove referred to, and in their present state of efficiency."

There are additional provisions of the lease authorizing the abandonment of the coal gas plant of the lessor, making certain provisions with respect to mains affected by electrolysis, and also providing for the sale of obsolete plant under certain conditions.

The agreement with respect to renewals and replacements is so broad as to place a heavy and undetermined burden upon the lessee with respect to renewals.

4th. Subdivision 21 requires an increase in the annual rental of \$10,000 a year when gas is sold at a price of less than 50c per 1000 cubic feet but more than 45c 1287 and an additional increase of \$5,000 in the annual rental when gas is sold at 45c per 1000 cubic feet or less. The clear tendency of this provision of the lease is to penalize the lessee if it reduces the price of gas. The purpose of the Board of Directors of the Department of Utilities of the City of Indianapolis is to make reductions in the price of gas furnished whenever that is possible. Any contract which increases the rent to be paid, when and if the price of gas is reduced is, in the Board's opinion, objectionable.

5th. The lease contains a provision that the lessee will perform and observe all of the covenants and agreements of the lessor (except those as to the payment of the prin-

cipal of the bonds) contained in its mortgage. Under this provision of the lease The Indianapolis Gas Company has submitted to the Citizens Gas Company a bill for services rendered to it by its attorneys.

6th. The rent (exclusive of taxes) now payable under the terms of this lease is as follows:

Interest on bonded debt.....	\$343,150
Dividends to stockholders.....	120,000
Organization expense Indianapolis Gas Company .....	300
<b>Total.....</b>	<b>\$463,450</b>

The Board of Directors of the Department of Utilities regards this rent as burdensome and out of proportion to the value of the use of the property. If a satisfactory arrangement is to be concluded there must be a substantial reduction in this rent, the amount of which reduction can only be determined by an investigation of the cost and value of the property and its usefulness to the Utility District.

As we have already notified you, the position of the Utility District is that this lease is not binding on the City of Indianapolis or enforceable against it or the property acquired by it from Citizens Gas Company.

We have pointed out above what we believe to be the most burdensome features of the lease in order that in any negotiation you may understand our position.

Very truly yours,

Thompson, Rabb & Stevenson.

## 1288 CITY'S STIPULATION EXHIBIT 69.

January 6, 1936.

The Indianapolis Gas Company,  
Indianapolis.

Gentlemen,—

By direction of the Board of Directors for Utilities of the City of Indianapolis, we hand you herewith a copy of a resolution adopted by such Board on January 3, 1936.

Very truly,

Thompson, Rabb & Stevenson.

enc.

1289 CITY'S STIPULATION EXHIBIT 70.

The following resolution was then offered, considered, and unanimously adopted:

"Whereas, on the 9th day of September, 1935, this Board adopted a resolution for the temporary use of property of The Indianapolis Gas Company for a period of six months from such date, pending negotiations for an agreement for the continued use of such property but not under an assignment of the certain lease from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis, dated September 30, 1913; and

Whereas, negotiations have been commenced but have not been concluded nor have they progressed; and

Whereas, this Board does not desire to continue after March 9, 1936, payments in amounts equivalent to those specified in said lease, for the use of said property:

Be It Resolved, by the Board of Directors for Utilities of the City of Indianapolis, That the arrangement for payments for temporary use and occupancy of the property of The Indianapolis Gas Company as specified in the resolution of this Board adopted September 9, 1935, be not continued after March 9, 1936; and

Be It Further Resolved, That a copy of this resolution be transmitted to said The Indianapolis Gas Company."

1290 CITY'S STIPULATION EXHIBIT 77.

February 10, 1936.

Mr. Lewis B. Ewbank,  
Fletcher Trust Bldg.  
Indianapolis.

Dear Sir:

In accordance with the request of Mr. Arthur V. Brown I am delivering to you for transmittal to the Indianapolis Gas Company a written proposal in connection with the purchase of its property.

Very truly yours,

## 1291 CITY'S STIPULATION EXHIBIT 78.

March 20, 1936.

The Indianapolis Gas Company,  
Majestic Building,  
Indianapolis.

Gentlemen:

The City of Indianapolis through its Department of Utilities desires from time to time to lay and use mains and pipes to be connected and used with mains and pipes of The Indianapolis Gas Company.

May it be understood:

(1) That pending an agreement between the City and The Indianapolis Gas Company settling the controversy between them as to the validity and binding effect on the City or its Department of Utilities of the certain lease dated September 30, 1913, between The Indianapolis Gas Company and Citizens Gas Company of Indianapolis, or pending the final determination in a litigated case whether such lease is a valid and binding obligation upon the City of Indianapolis or the Department of Utilities of said City or any of the property of either, the City or its Department of Utilities may from time to time lay and use mains and pipes in connection with the mains and pipes of The Indianapolis Gas Company without prejudice to the position or rights of either the City or its Department of Utilities or of The Indianapolis Gas Company;

(2) That pipes and mains so laid and used by the City or its Department of Utilities shall not be considered as laid or used under or by reason of said lease, nor as becoming the property of The Indianapolis Gas Company, unless or until an agreement upon that subject is made between The Indianapolis Gas Company and the City or its Department of Utilities, or unless and until such subject is finally determined by litigation between the City of Indianapolis or its Department of Utilities and The Indianapolis Gas Company.

Please let us hear from you.

Very truly yours,

Thompson, Rabb & Stevenson.

1292 CITY'S STIPULATION EXHIBIT 79.

1004 Majestic Building,  
Indianapolis, Indiana,  
April 6, 1936.

Messrs. Thompson, Rabb & Stevenson,  
115 North Pennsylvania Street,  
Indianapolis, Indiana.

Gentlemen:

I am directed by the Board of Directors of The Indianapolis Gas Company to acknowledge your letter of March 20, 1936, and to advise you that this Company grants your request made therein as to the future laying of pipes and mains to be connected with and extensions of the pipes and main which this Company now owns, upon the terms and conditions outlined in your letter, upon, however, the following and additional terms and conditions, viz:

1. That the Department of Utilities of the City of Indianapolis shall advise this Company in writing before beginning actual construction of any such mains and pipes, of the location and extent of said additions or extensions to existing mains and pipes belonging to this Company, and of the estimated cost thereof to the Citizens Gas and Coke Utility or the Department of Utilities of the City of Indianapolis.

2. That The Indianapolis Gas Company shall have the right and option to purchase and acquire said means and pipes so laid and constructed by the Citizens Gas and Coke Utility or the Department of Utilities of the City of Indianapolis upon the payment to either said Utility or the Department of Utilities of the City of Indianapolis such sum or moneys as shall equal the entire cost to said Citizens Gas and Coke Utility or Department of Utilities of the City of Indianapolis of the purchase, laying and installing of said mains and pipes.

The option and right to acquire said mains and pipes to continue for a period of three years from this date and exercisable upon ninety (90) days written notice to the Department of Utilities of the City of Indianapolis.

3. The consent granted by this letter may be cancelled

and annulled upon sixty (60) days written notice to the Department of Utilities of the City of Indianapolis as to any additional mains and pipes, the construction or laying of which shall not have been commenced at the time of receipt of said notice of cancellation. Provided that said notice of cancellation, if the same should be given, would not in any wise end or terminate the option and right of this Company to purchase any pipes and mains laid or constructed prior to said cancellation under the consent of this letter all as provided for in Clause No. 2.

We shall be pleased if you will advise us of the acceptance of the terms of this granting of your request.

The Indianapolis Gas Company,

By Wm. J. Yule,

*Secretary.*

1294 CITY'S STIPULATION EXHIBIT 80.

April 8, 1936.

The Indianapolis Gas Company,  
Majestic Building,  
Indianapolis.

Gentlemen:

This will acknowledge receipt of your letter of April 6th, 1936, with respect to main extensions.

This letter has been submitted to the Board of Directors for the Department of Utilities of the City of Indianapolis. No objection was expressed to the 1st and 3rd conditions stated in your letter, but we are asked to make this inquiry about the 2nd condition:

Would it be agreeable with you, in lieu of such 2nd condition, to provide that if the lease of September 30, 1913, be held binding upon the City, any such extensions be considered as made under its provisions; but that if such lease is held not binding, you agree, not by way of option, but positively, to acquire such extension at cost?

Please let us hear from you.

Very truly,

Thompson, Rabb & Stevenson.

1295 CITY'S STIPULATION EXHIBIT 81.

1004 Majestic Building,  
Indianapolis, Indiana,  
May 12, 1936.

Messrs. Thompson, Rabb & Stevenson,  
115 North Pennsylvania Street,  
Indianapolis, Indiana.

Gentlemen:

In reply to your letter of April 8, 1936, relative to the subject of extensions of mains belonging to this Company, we desire to state:

It is entirely agreeable to us that in event lease of September 30, 1913, is held binding upon the City of Indianapolis and its Department of Utilities, such extensions as you hereafter make to our mains be considered as made under and pursuant to the terms and provisions of said lease.

We cannot agree, in event the lease is held not binding, to purchase said extensions at their cost as you requested in your letter.

We will, however, in such event agree to purchase such extensions as shall hereafter be made to our mains at the appraised value thereof, not to exceed cost, upon the following terms and conditions:

1. Before any extensions are actually started, you submit to us, for examination by us and our engineers, a full and complete statement and plan of such proposed extension or extensions with such information as to territory to be served and services to be rendered as we may request, together with a statement of the cost of the same.

2. Upon approval by us of such proposed extension or extensions, and the construction by you of the same in accordance with said approval, when and as it is given, we shall then undertake definitely to purchase from you said extension or extensions, said purchase to be consummated within a reasonable time after the settlement of the controversy now existing between us as to the effect and validity of the lease above referred to. The approval or rejection by us of any proposed extensions is to be made in writing.

Very truly yours,

The Indianapolis Gas Company.

By Wm. J. Yule,

*Secretary.*



## 1296 CITY'S STIPULATION EXHIBIT 82.

May 23, 1936.

The Indianapolis Gas Company,  
Indianapolis.

Gentlemen,—

Confirming our conversation today with Mr. A. V. Brown and Judge Ewbank:

Your letter of May 12th referred to an appraised price or value for such extensions of your mains as should be made, but omitted to state how or by whom such appraisal was to be made—a material point.

Will you agree that such appraisal is to be made jointly by an engineer to be selected by you and by an engineer to be selected by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, or by Citizens Gas & Coke Utility, each to pay the expense of its own engineer; and in the event of their disagreement, i. e. the disagreement of such engineers, they to select a third engineer, whose valuation is to be binding upon both parties, and whose expense is to be paid half by each party; the valuation to be made upon notice by either party to the other that a valuation is desired.

And will you let us hear from you as quickly as possible, preferably Monday?

Very truly,

Thompson, Rabb & Stevenson.

## 1297 CITY'S STIPULATION EXHIBIT 83.

1004 Majestic Building,  
Indianapolis, Indiana,  
May 25, 1936.

Messrs. Thompson, Rabb & Stevenson,  
115 North Pennsylvania Street,  
Indianapolis, Indiana.

Gentlemen:

In reply to your letter of May 23rd which has reference to our letter of May 12th in respect to extensions which may hereafter be made to our mains, we desire to say the

method and procedure which you propose for the appraisal of such extensions is satisfactory to those of our officers and directors to whom it has been possible to submit your suggestion. It seems reasonable to assume that there will be no objection on the part of other officers and directors when they can be consulted.

Very truly yours,  
The Indianapolis Gas Company,  
By Wm. J. Yule,  
*Secretary.*

1298 CITY'S STIPULATION EXHIBIT 84.

1004 Majestic Building,  
Indianapolis, Indiana,  
June 3, 1936.

Messrs. Thompson, Rabb & Stevenson,  
115 North Pennsylvania Street,  
Indianapolis, Indiana.

Gentlemen:

In reply to your letter of May 23rd last relative to the method of procedure for appraisals of extensions which may be made by the City or the Citizens Gas and Coke Utility to the mains of our Company in accordance with the previous correspondence on the subject, we desire to state that the proposal set out in your letter is satisfactory to us and we hereby accept the same as a completion of the understanding heretofore had through correspondence.

Very truly yours,  
The Indianapolis Gas Company,  
By Wm. J. Yule,  
*Secretary.*

## 1299 CITY'S STIPULATION EXHIBIT 85.

Indianapolis, Indiana,  
September 30, 1936.

The Indianapolis Gas Company,  
Indianapolis, Indiana.

Gentlemen:

On February 10th, 1936, at your suggestion, we submitted to you a proposition containing the terms on which we were willing to acquire the plant and property of The Indianapolis Gas Company. This proposition was submitted with a clear understanding that it was requested by the directors of the Company and by a substantial number of both the stockholders and bondholders of the Company. It was likewise stated to you before the proposition was submitted that no purchase would be consummated merely on the action of the Company through its stockholders but that such a purchase must have the approval of the bondholders.

We understand that the terms of the proposition submitted do not meet with your approval.

In addition, an action has been commenced in the United States District Court in Indianapolis by the Trustee under the deed of trust securing mortgage bonds of The Indianapolis Gas Company in which the plaintiff seeks a declaration of the validity and binding effect of the lease of September 30, 1913, against the City of Indianapolis as successor trustee.

We procured an extension for filing our answer in this case until October 1st, but the plaintiff has been unwilling to grant a further extension of time and it is necessary for us to file our answer not later than Thursday of this week.

In view of these circumstances the offer which we made to you to purchase your property is hereby withdrawn.

Very truly yours,

Board of Directors for Utilities of  
The City of Indianapolis,

By Henry L. Dithmer,

*Its President.*

1300

CITY'S EXHIBIT B.

Pages 358 to 362, inclusive of the Minute Book of the Board of Directors for Utilities of the City of Indianapolis.

(Here appear (pp. 358-361) the contract of March 2, 1936 between the Department of Utilities of the City of Indianapolis and The Indianapolis Gas Company and a certified copy of a resolution adopted by the Board of Directors of The Indianapolis Gas Company ratifying said contract. A copy of said contract and of said resolution appears as Exhibit E to the answer and counterclaim of the City of Indianapolis, et al. (I R. 205-208)) (page 362)

The following resolution was thereupon offered and unanimously adopted:

Resolved, By the Board of Directors for Utilities of the City of Indianapolis:

That the certain written agreement dated March 2, 1936, by and between The Indianapolis Gas Company, an Indiana corporation, and the Department of Utilities of the City of Indianapolis, with respect to continued temporary use by the City of Indianapolis of property belonging to said The Indianapolis Gas Company, is hereby approved and adopted by this Board for and on behalf of the City of Indianapolis; and the act of Henry L. Dithmer in executing said agreement for this Board as its President is hereby ratified and confirmed; and

That the officers of said Board and of Citizens Gas & Coke Utility are hereby authorized and directed to take all steps necessary and proper to carry into effect the said agreement.

A discussion as to the cost of gas then followed.

There being no further business, the meeting adjourned.

(Signed) Henry L. Dithmer,

*President.*

(Signed) Roy Sahm,

*Secretary.*

1301   “(City's Exhibit C omitted pursuant to stipulation filed Nov. 22, 1939.)”

1302

## CITY'S EXHIBIT 1.

State of Indiana }  
 Marion County } ss.

The undersigned, John M. Layton, hereby certifies:

1. That he is the duly elected, qualified and acting City Clerk of the City of Indianapolis in said County and State.

2. That as such City Clerk he has the custody of the official records of the Common Council of the City of Indianapolis, including the books and records of said Common Council in which all ordinances and appropriations adopted or made by said Common Council are recorded.

3. That after diligent search of all of the records of said Common Council of the City of Indianapolis, the undersigned finds no record to exist of the following tenor:

First. That there is no record of any appropriation for the making of any payments called for by a certain lease executed by and between The Indianapolis Gas Company and the Citizens Gas Company of Indianapolis on September 30, 1913, either before, at or after the date of the execution of such lease.

Second. That there is no record of any ordinance adopted or other action taken by the Common Council of the City of Indianapolis either before, at or after the date of the execution of said lease of September 30, 1913, by and between The Indianapolis Gas Company and the Citizens Gas Company, authorizing the execution of said lease by the City of Indianapolis or by the Citizens Gas Company of Indianapolis or by any one on behalf of the City

of Indianapolis and no ordinance or other action approving, confirming or ratifying said lease, or adopting the provisions thereof or attempting to bind the City of Indianapolis or any of its property to the performance of such lease, or recognizing any binding effect thereof on the City of Indianapolis or any of its property.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the City of Indianapolis, this 9th day of February, 1939.

(Seal) John M. Layton (signed)  
 Clerk of the City of Indianapolis.

“(Certificate to qualifications of certifying officer omitted in printing).”

(Inserted pursuant to stipulation filed November 22, 1939.)

1304

## CITY'S EXHIBIT 2.

## Certificate.

State of Indiana }  
 Marion County } ss.

The undersigned, Martin H. Walpole, hereby certifies: That he is the duly appointed, qualified and acting Executive Secretary and Clerk of the Department of Public Works of the City of Indianapolis, Indiana; that as such, he has custody of the official records of the Department of Public Works of said City, including the official records of the Board of Public Works from the date of creation of said Board in the year 1891 until its change of name in 1935 to the Board of Public Works and Sanitation, and that he has custody of the official records of said last named Board.

That he has caused a search to be made of said records and finds no record to exist of this tenor, viz:

(a) Authorizing, on behalf of said City, said Department, or said Board, the execution of the certain lease dated September 30, 1913, by and between The Indianapolis Gas Company and Citizens Gas Company of Indianapolis;

(b) Ratifying, confirming, or approving the execution of said lease, on behalf of said City, Department, or Board;

(c) Adopting the provisions of said lease, on behalf of said City, Department, or Board;

(d) Attempting to bind said City, or any of its property in the custody of said Department or Board, to the performance of said lease;

(e) Recognizing any binding effect of said lease upon said City, or any of its property, or said Department or Board.

Witness my hand this 28th day of February, 1939.

M. H. Walpole (signed)

*As such Executive Secretary and Clerk.*

1305 The Board of Public Works and Sanitation does not and is not required to have an official seal.

M. H. Walpole (signed)

*As such Executive Secretary and Clerk.*

1306 "(Certificate to qualifications of certifying officer omitted in printing)."

(Inserted pursuant to stipulation filed November 22, 1939.)

1307

## CITY'S EXHIBIT 3.

State of Indiana, }  
Marion County. } ss.

The undersigned, Charles S. Rauh, hereby certifies:

1. That he is the duly appointed, qualified and acting Secretary of the Board of Trustees for Utilities of the Department of Utilities of the City of Indianapolis in said County and State.

2. That as such Secretary he has the custody of the official records of the Board of Trustees for Utilities of the Department of Utilities of the City of Indianapolis including the Minute Books and Records in which all action taken by said Board of Trustees for Utilities is recorded.

3. That after diligent search of all the records of the Board of Trustees for Utilities of the Department of Utilities of the City of Indianapolis the undersigned finds no record to exist of the following tenor:

1st. That there is no record of any action taken by said Board of Trustees for Utilities approving or adopting on behalf of the City of Indianapolis a certain lease of September 30, 1913, by and between The Indianapolis Gas Company and the Citizens Gas Company of Indianapolis.

2nd. That there is no record of any action of said Board of Trustees for Utilities confirming or ratifying said lease or adopting the provisions thereof or attempting to bind the City of Indianapolis or any of its property to the performance of such lease or recognizing any binding effect thereof on the City of Indianapolis or any of its property.

3rd. That there is no record of any action taken by said Board of Trustees for Utilities of the Department of  
1308 Utilities of the City of Indianapolis authorizing the issuance or circulation of any circular or advertising matter or authorizing anyone to make any representations on behalf of the Department of Utilities of the City of Indianapolis, in connection with the re-sale of utility revenue bonds by Otis & Company and Halsey, Stuart & Company, or any other person or corporation.

4th. That there is no record of any action taken by the Department of Utilities of the City of Indianapolis authorizing any person to do any act or make any representation in connection with the re-sale of said revenue bonds.



In Witness Whereof, I have hereunto set my hand as such Secretary this 8th day of February, 1939.

(Signed) Charles S. Rauh  
*Secretary of the Board of Trustees  
 for Utilities of the Department of  
 Utilities of the City of Indianapolis.*

1309 “(Certificate to qualifications of certifying officer omitted in printing).”

(Inserted pursuant to stipulation filed November 22, 1939.)

1310

#### CITY'S EXHIBIT 4.

State of Indiana, }  
 Wayne County. } ss.

The undersigned, Roy Sahm, hereby certifies:

1. That he is the duly appointed, qualified and acting Secretary of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis in said County and State.

2. That as such Secretary he has the custody of the official records of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis including the Minute Books and Records in which all action taken by said Board of Directors for Utilities is recorded.

3. That after diligent search of all the records of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis the undersigned finds no record to exist of the following tenor:

1st. That there is no record of any action taken by said Board of Directors for Utilities approving or adopting on behalf of the City of Indianapolis a certain lease of September 30, 1913, by and between The Indianapolis Gas Company and the Citizens Gas Company of Indianapolis.

2nd. That there is no record of any action of said Board of Directors for Utilities confirming or ratifying said lease or adopting the provisions thereof or attempting to bind the City of Indianapolis or any of its property to the performance of such lease or recognizing any binding effect thereof on the City of Indianapolis or any of its property.

3rd. That there is no record of any action taken by said Board of Directors for Utilities of the Department of  
 1311 Utilities of the City of Indianapolis authorizing the

issuance or circulation of any circular or advertising matter or authorizing anyone to make any representations on behalf of the Department of Utilities of the City of Indianapolis, in connection with the re-sale of utility revenue bonds by Otis & Company and Halsey, Stuart & Company, or any other person or corporation.

4th. That there is no record of any action taken by the Department of Utilities of the City of Indianapolis authorizing any person to do any act or make any representation in connection with the re-sale of said revenue bonds.

In Witness Whereof, I have hereunto set my hand as such Secretary this 8th day of February, 1939.

Roy Sahm (Signed)

*Secretary of the Board of Directors for  
Utilities of the Department of Utili-  
ties of the City of Indianapolis.*

. . . . .

1312 "(Certificate to qualifications of certifying officer omitted in printing)."

(Inserted pursuant to stipulation filed November 22, 1939.)

1313

CITY'S EXHIBIT 5-A.

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana

Indianapolis Division.

The Chase National Bank of the City of New York, Trustee,	} In Equity No. 1844
<i>Plaintiff,</i>	
<i>vs.</i>	
Citizens Gas Company of Indianapolis, a corporation, <i>et al,</i>	
<i>Defendants.</i>	

INTERROGATORIES PROPOUNDED TO THE INDIANAPOLIS GAS COMPANY BY THE DEFENDANT, CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARD OF TRUSTEES AND DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

1314-1381         •         •         •         •         •         •

1319 Interrogatory No. 23.

Were you advised for the first time on or about July 10, 1935, that the City of Indianapolis was denying the validity of and the enforceability against it of said lease of September 30, 1913?

Interrogatory No. 24.

At any time prior to July 10, 1935, did you know of any controversy existing between the Indianapolis Gas Company and the City of Indianapolis as to the validity or enforceability against the City of Indianapolis of said lease of September 30, 1913?

Interrogatory No. 25.

Did you, through any officer, agent or attorney of yours, advise said Chase National Bank of New York prior to March 2, 1936, that your company was proposing to enter into an agreement with the City of Indianapolis for the payment into the The Indiana National Bank of Indian-

apolis of certain sums of money pending the final determination of this controversy?

**Interrogatory No. 26.**

If you shall answer Interrogatory No. 25 in the affirmative, then state what officers, agent, attorney or representative of yours gave such information to said Chase National Bank of New York and to what officer, agent or attorney of said Chase National Bank of New York such information was communicated?

**1320 Interrogatory No. 27.**

Has any correspondence been interchanged between yourself or any one acting on your behalf and said Chase National Bank of New York respecting said agreement of March 2, 1936, or in any way dealing with that agreement or what action you or The Indiana National Bank should take in respect of such agreement?

**Interrogatory No. 28.**

If you answer Interrogatory No. 27 in the affirmative, then give a list of the dates of any letters and telegrams so interchanged, the persons by whom written and to whom written.

**Interrogatory No. 29.**

Are the letters and telegrams referred to in Interrogatory No. 28 in your possession?

**Interrogatory No. 30.**

If you shall answer the preceding interrogatories to the effect that there was no interchange of correspondence between yourself and said Chase National Bank prior to the execution of the agreement of March 2, 1936, then state whether there was any such communication after March 2, 1936.

**Interrogatory No. 31.**

If you shall answer Interrogatory No. 30 in the affirmative, then state whether any letters or telegrams were interchanged between yourself or any officer, agent or attorney of yours and the Chase National Bank in respect of said agreement of March 2, 1936.

**1321 Interrogatory No. 32.**

If you shall answer Interrogatory No. 31 in the affirmative, then attach a list of such letters and telegrams, giving the date written, by whom and to whom written.

Interrogatory No. 33.

If you shall answer Interrogatory No. 32 in the affirmative, then state whether the letters and telegrams received by you and copies of those written by you are in your possession.

Interrogatory No. 34.

If in answer to Interrogatories numbered 27 to 31, inclusive, you state that you had no interchange of correspondence with the Chase National Bank of New York in reference to the agreement of March 2, 1936, either before or after that agreement was executed, then state whether there were any oral negotiations, or conversations, or communications between you and said Chase National Bank of New York either before or after March 2, 1936, in respect of the execution or performance of said contract.

Interrogatory No. 35.

If you shall answer Interrogatory No. 34 in the affirmative, then give the dates of such conferences and what officer, representative or attorney of yours conducted the same on your behalf or participated therein.

Interrogatory No. 36.

Have you or any of your officers or stockholders 1322 agreed directly or indirectly, in writing or otherwise, to indemnify the Chase National Bank of New York for the costs or expenses of the suit commenced by it and now being prosecuted in the United States District Court as Cause No. 1844 in Equity, or agreed to become primarily responsible for any such costs or attorneys' fees?

Interrogatory No. 37.

Have you informed or caused said Chase National Bank of New York to be informed, directly or indirectly, of the payments which actually were made by the City of Indianapolis into the Indiana National Bank as escrow agent under the agreement of March 2, 1936?

Interrogatory No. 38.

If you shall answer Interrogatory No. 37 in the affirmative, then state whether such information was oral or written.

**Interrogatory No. 39.**

If you shall answer Interrogatory No. 38 that the advice so given was written, attach a list of all letters or telegrams exchanged between yourself and said Chase National Bank of New York, in respect of such deposits, the date of each letter or telegram, and the persons to whom written and the person by whom written.

**Interrogatory No. 40.**

Are the originals of the letters and telegrams received by you referred to in the last preceding interrogatory 1323 and the copies of those written by you in your possession?

**Interrogatory No. 41.**

Approximately how many gas consumers now receive service from the mains or pipes of The Indianapolis Gas Company?

**Interrogatory No. 42.**

Have you ever denied the validity of the lease of September 30, 1913?

**Interrogatory No. 43.**

Have you constantly asserted since July 10, 1935, that the lease of July 30, 1913, was valid and enforceable against the City of Indianapolis?

**Interrogatory No. 44.**

Has your Company ever entered into any negotiations with the City of Indianapolis or its representatives for the purpose of settling or adjusting the controversy between The Indianapolis Gas Company and the City of Indianapolis in disregard of the rights of the bondholders of The Indianapolis Gas Company?

**Interrogatory No. 45.**

What payments were made to or on behalf of your Company by the Citizens Gas Company of Indianapolis since September 9, 1935, and prior to March 2, 1936? Give a full list of all payments so made, the dates when made and the purpose for which such payments were made i. e., whether for interest, dividends, expenses, taxes, or the like.

1324-13626     •     •     •     •     •     •

(Omitted pursuant to stipulation filed November 22, 1939.)

1327

CITY'S EXHIBIT 5-B.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1844) • •

ANSWER OF DEFENDANT THE INDIANAPOLIS GAS COMPANY TO INTERROGATORIES PROPOUNDED BY DEFENDANT AND COUNTER-CLAIMANT CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARD OF TRUSTEES AND DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

Comes now defendant The Indianapolis Gas Company and, in response to the interrogatories propounded to said defendant by defendant and counter-claimant City of Indianapolis, makes and presents its answers to the same, as follows:

1328-1331      •      •      •      •      •

1352 Interrogatory No. 23.

Ans. This company was first advised that the City of Indianapolis was denying the validity of and enforceability against it of said lease of September 30, 1913 by letter dated July 23, 1935, a copy of which is attached to these answers and marked Exhibit I.

Interrogatory No. 24.

Ans. No.

1333 Interrogatory No. 25.

Ans. No.

Interrogatory No. 26.

Ans. No answer required.

Interrogatories Nos. 27, 28, 29, 30, 31, and 32.

Ans. The only correspondence interchanged between the Chase National Bank and this company respecting said agreement of March 2, 1936, were had subsequent thereto and were letters of inquiry as to whether or not the pay-



ments provided for in said agreement were being made. A copy of said correspondence is included as part of this answer and marked exhibits 2 to 34.

Interrogatory No. 33.

Ans. Yes.

Interrogatory No. 34.

Ans. Yes.

Interrogatory No. 35.

Ans. On March 11, 1936, Mr. Arthur V. Brown, Vice-President, and Mr. Wm. R. Higgins, one of counsel for said company, attended a conference at the office of the trustee, Chase National Bank, at which conference they advised said trustee of the execution of said agreement of March 2, 1936.

Interrogatory No. 36.

Ans. No.

Interrogatory No. 37.

Ans. Yes, in answer to inquiries.

Interrogatory No. 38.

Ans. The Chase National Bank was so advised as to payments made by the City of Indianapolis under the agreement of March 2, 1935 into the Indiana National Bank as escrow agent, both orally and in writing.

1334 Interrogatory No. 39.

Ans. Copies of correspondence here requested is set out in answer to interrogatories Nos. 27, 28, 29, 30, 31 and 32 supra.

Interrogatory No. 40.

Ans. Yes.

Interrogatory No. 41.

Ans. We have no information or knowledge as to how many gas consumers now receive service from the mains or pipes of the Indianapolis Gas Company, its said property having been, since September 30, 1913, continuously under the operation and control of the Citizens Gas Com-

pany of Indianapolis, until September 9, 1935, since which time it has been under the operation and control of the City of Indianapolis.

Interrogatory No. 42.

Ans. No.

Interrogatory No. 43.

Ans. The validity and enforceability of the lease of September 30, 1913, executed between this company and the Citizens Gas Company of Indianapolis, and its successors and assigns, has always been asserted whenever the question has been raised.

Interrogatory No. 45.

Ans. No payments have been made to or on behalf of this company to its knowledge by the Citizens Gas Company of Indianapolis, since September 9, 1935, on which date the City of Indianapolis took over the operation and control of the said property of said last named company.  
1335-1337 . . . . .

Subscribed and sworn to before me, a Notary Public in and for said above named County and State, this 4th day of February, 1939.

(Signed) E. James Hayth,

(Seal)

Notary Public.

My commission expires: Oct. 1, 1941.

“(Verification of William J. Yule, Secretary of The Indianapolis Gas Company, omitted in printing.)”

(Inserted pursuant to stipulation filed November 22, 1939.)

(Here follows proof of service.)

1338-1342 . . . . .

(d) In place of Exhibits 1 to 34, inclusive, attached to these answers to interrogatories substitute the following:

“Here follows Exhibit 1, letter dated July 23, 1935, from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is in evidence as Plaintiffs’ Stipulation Exhibit 58.

“Exhibits 2 to 5, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties.

"Exhibits 6 to 19, inclusive, to these answers to interrogatories, appear elsewhere in the record as follows:

Exhibit to Indianapolis Gas answers No.	Appears in the Record as			
6	Plaintiffs' Exhibit	121		
7	Exhibit 4	to plaintiff's answers to interrogatories		
8	"	6	"	"
9	"	7	"	"
10	"	12	"	"
11	Plaintiffs' Exhibit	111A		
11	"	"	111B	
12	"	"	112	
12	"	"	112A	
13	"	"	113	
14	"	"	114	
15	"	"	115	
16	"	"	116	
17	"	"	117	
18	"	"	118	
19	"	"	119	

(Plaintiff's answers to the interrogatories propounded to it, and the exhibits thereto, are in evidence as City's Exhibit 6B.)

"Exhibits 20 to 34, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties." 1256

(Inserted pursuant to stipulation filed November 22, 1939.)

1343 (Exhibits 6 to 34, inclusive, to the answers of The Indianapolis Gas Company appear elsewhere in the record as follows:

Exhibit to Indianapolis Gas answers No.	Appears in the Record as
6	Plaintiffs' Exhibit 121
7	Exhibit 4 to plaintiff's answers to interrogatories
8	" 6 "
9	" 7 "
10	" 12 "
11	Plaintiffs' Exhibit 111A
11	" " 111B
12	" " 112
12	" " 112A
13	" " 113
14	" " 114
15	" " 115
16	" " 116
17	" " 117
18	" " 118
19	" " 119
20	Exhibit 29 to plaintiff's answers to interrogatories
21	" 30 "
22	City's Exhibit C
23	Exhibit 32 to plaintiff's answers to interrogatories
24	" 34 "
25	" 35 "
26	" 36 "
27-34, inclusive	Exhibits 38-45, inclusive, to plaintiff's answers to interrogatories

(Plaintiff's answers to the interrogatories propounded to it, and the exhibits thereto, are in evidence as City's Exhibit 6B.)

1344

## CITY'S EXHIBIT 6-A.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1844) • •

INTERROGATORIES PROPOUNDED TO PLAINTIFF  
BY THE DEFENDANTS THE CITY OF INDIAN-  
APOLIS AND THE INDIVIDUAL DEFENDANTS  
WHO ARE MEMBERS OF THE BOARD OF TRUS-  
TEES AND DIRECTORS FOR UTILITIES OF THE  
CITY OF INDIANAPOLIS.

1345-1347 • • • • •

1348 Interrogatory No. 21.

When did you first learn that the City of Indian-  
1349 apolis was denying the validity of and the enforce  
ability against it of said lease of September 30, 1913,  
and from whom did you acquire this information?

Interrogatory No. 22.

Did you have any knowledge prior to March 2, 1936,  
that The Indianapolis Gas Company was proposing to  
enter into an agreement with the City of Indianapolis for  
the payment into The Indiana National Bank of certain  
sums of money pending the determination of this con-  
troversy?

Interrogatory No. 23.

If you answer Interrogatory No. 22 in the affirmative  
then state from whom you acquired this information?

Interrogatory No. 24.

Did you receive on March 30, 1936, the sum of \$171,575,  
or approximately that amount, together with your regular  
charges for disbursing such sum of money?

Interrogatory No. 25.

If you answer Interrogatory No. 24 in the affirmative  
then state from whom and for what purposes this money  
was received.

Interrogatory No. 26.

If you answer Interrogatory No. 25 in the affirmative  
was there any accompanying letter explaining the terms  
under which this payment was made?

1350 Interrogatory No. 27.

If you answer Interrogatory No. 26 in the affirmative what is the date of such letter and by whom was it written?

Interrogatory No. 28.

Is the letter referred to in Interrogatory No. 27 in your possession?

Interrogatory No. 29.

Give a list of all sums received by you other than the \$171,575 from the City of Indianapolis or The Indiana National Bank at any time subsequent to September 9, 1935, on account of interest on the bonds of The Indianapolis Gas Company.

Interrogatory No. 30.

Have you had any correspondence with The Indianapolis Gas Company or The Indiana National Bank in respect of the agreement of March 2, 1936, referred to in Interrogatory No. 29, supra; and if so, attach to your answer a list of such correspondence showing the date of each letter and by whom written.

Interrogatory No. 31.

If you shall answer Interrogatory No. 30 in the affirmative then state whether the letters received by you and copies of those written by you are in your possession?

Interrogatory No. 32.

If you shall answer the preceding interrogatories, that you did not know that the agreement of March 2, 1936, was to be executed before its execution, then state when you first learned of the execution of such agreement and from whom you received this information?

Interrogatory No. 33.

Have you ever protested to the City of Indianapolis, to The Indiana National Bank or The Indianapolis Gas Company against payments being made in pursuance of such agreement?

Interrogatory No. 34.

If you shall answer Interrogatory No. 33 in the affirmative, then state when and to whom such protests were made?

1352     •     •     •     •     •     •

1353

## CITY'S EXHIBIT 6B.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1844) • •

ANSWERS OF PLAINTIFF, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, TO INTERROGATORIES PROPOUNDED TO IT ON DECEMBER 2, 1938, BY THE DEFENDANTS THE CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARD OF TRUSTEES AND DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

United States of America, }  
Southern District of New York, } ss.  
County of New York.

Paul C. Beardslee, having been duly sworn, says that he is Assistant Trust Officer of The Chase National Bank of the City of New York, plaintiff in the above entitled cause, and that he is an officer competent to testify in behalf of said plaintiff and makes the following answers to the interrogatories propounded to plaintiff on December 2, 1938, by the defendants the City of Indianapolis and the individual defendants who are members of the Board of Trustees and Directors for Utilities of the City of Indianapolis:

1354 • • • • •

1355 21. The plaintiff received this information on or about September 17, 1935, from Prudential Insurance Company of America.

22. No.

23. No answer necessary.

24-28. On March 28, 1936, the Chase National Bank received from The Indianapolis Gas Company a letter dated March 26, 1936, signed by Wm. J. Yule, Secretary, enclosing the company's check payable to its order in the sum of \$168,575. A copy of said letter is attached hereto and marked "Exhibit 3." No funds were received until later to pay its regular charges for disbursing said sum.

29. On October 1, 1935 the Chase National Bank received authority from Indiana National Bank to charge its account with the sum of \$168,575 for account of In-



dianapolis-Gas Company bond interest due on that day. The Chase National Bank did not know when this money was received whether it was furnished by The Indianapolis Gas Company, the Citizens Gas Company, or the City of Indianapolis.

30. Attached hereto and marked "Exhibits 4 to 12-B," inclusive, are copies of all correspondence between the Chase National Bank and The Indianapolis Gas Company or the Indiana National Bank in respect of the Agreement of March 2, 1936.

Exhibit 4. Letter dated May 4, 1937, addressed to Indianapolis Gas Company by Chase National Bank.

Exhibit 5. Letter dated May 12, 1937, addressed to Chase National Bank by Indiana National Bank.

Exhibit 6. Letter dated November 19, 1937, addressed to Indianapolis Gas Company by Chase National Bank.

Exhibit 7. Letter dated November 23, 1937, addressed to Chase National Bank by Indianapolis Gas Company.

Exhibit 8. Letter dated April 11, 1938, addressed to Indiana National Bank by Chase National Bank.

Exhibit 9. Letter dated April 15, 1938, addressed to Chase National Bank by Indiana National Bank, together with transcript of Escrow Account referred to therein.

Exhibit 10. Letter dated April 18, 1938, addressed to Indianapolis Gas Company by Chase National Bank.

Exhibit 11. Letter dated April 20, 1938, addressed to Chase National Bank by Indianapolis Gas Company, together with the statement referred to therein.

Exhibit 12. Letter dated April 27, 1938, addressed to Chase National Bank by the Indianapolis Gas Company.

Exhibit 12-A. Letter dated October 26, 1938, addressed to Indiana National Bank by Chase National Bank.

Exhibit 12-B. Letter dated October 29, 1938, addressed to Chase National Bank by Indiana National Bank.

1356 31. Yes.

32. At a conference held in the office of the Chase National Bank on or about March 11, 1936, with an officer and counsel of The Indianapolis Gas Company the Chase National Bank learned for the first time of the Agreement dated March 2, 1936, that it had been executed, and was told generally of its terms.

33-34. Yes, the Chase National Bank brought the pending suit.

1356-7 • • • • •

1000

*Exhibit 4.*

1358 “(Verification of Paul C. Beardslee omitted in printing)”.

(Inserted pursuant to stipulation filed November 22, 1939.)

1359-1364 • • • • •

“(Exhibits 1 to 3, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties)”.

(Inserted pursuant to stipulation filed November 22, 1939.)

1365

*Exhibit 4.*

Copy.

May 4, 1937.

Mr. Arthur V. Brown, Vice President  
Indianapolis Gas Company  
Indianapolis  
Indiana.

Indianapolis Gas Company Mortgage  
dated October 1, 1902

Dear Mr. Brown:

Will you please confirm to us that the City of Indianapolis is depositing in the Indiana National Bank, pursuant to the Agreement of March 2, 1936, a sum equal to the rental stipulated under the nine-ty-nine year lease.

Thanking you for your kind cooperation, we are

Very truly yours,

Paul C. Beardslee,  
*Assistant Trust Officer.*

PCB:z

1366

Exhibit 5.

Copy.

The Indiana National Bank.  
Indianapolis, Ind.

May 12, 1937.

Mr. Paul C. Beardslee, Assistant Trust Officer  
The Chase National Bank  
New York, New York

Dear Sir:

Referring to your letter of May 4th, regarding Indianapolis Gas Company Mortgage dated October 1, 1902, wish to advise that all "escrow deposits" have been made to date and are now on deposit with this bank in accordance with the stipulations of agreement of March 2, 1936, between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and The Indianapolis Gas Company.

Very truly yours,

(signed) R. M. Fletcher,

*Vice President & Cashier.*

RMF/MEF

1367

Exhibit 6.

Copy.

November 19, 1937.

Mr. William J. Yule, Secretary  
The Indianapolis Gas Company  
Indianapolis  
Indiana.

The Indianapolis Gas Company Mortgage  
dated October 1, 1902.

Dear Sir:

For the completion of our files, will you be good enough to advise us whether or not the Utilities District deposited with the Indiana National Bank, in escrow, a sum equivalent to the interest due October 1, 1937 on the First Mortgage 5% Bonds issued under the above described Mortgage.

Very truly yours,

Paul C. Beardslee,  
*Assistant Trust Officer.*

PCB:z

1368

Exhibit 7.

Copy.

1004 Majestic Building,  
Indianapolis, Indiana,  
November 23, 1937.

The Chase National Bank  
Trust Department,  
11 Broad Street,  
New York, N. Y.

Attention: Mr. Paul C. Beardslee, Assistant Trust Officer.

Gentlemen:

Replying to your letter of November 19th, escrow deposit in the amount of the interest due October 1, 1937, on the bonds of this Company was made with The Indiana National Bank of this City on September 28, 1937.

Yours very truly,

The Indianapolis Gas Company

By (signed) W. J. Yule

*Secretary.*

1369

Exhibit 8.

April 11, 1938.

The Indiana National Bank,  
Indianapolis, Indiana.

Attention: Mr. R. M. Fletcher, Vice President and Cashier.

Re: Indianapolis Gas Company Mortgage  
dated October 1, 1902.

Gentlemen:

For the purpose of our records as Trustee under the above Mortgage, we would appreciate your advising whether all "escrow deposits" have been made since your letter of May 12, 1937, in accordance with the stipulations of agreement of March 2, 1936 between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and the Indianapolis Gas Company.

Thanking you in advance for your kind cooperation in this matter, we are,

Yours very truly,

Paul C. Beardslee

*Assistant Trust Officer.*

545-dk

1370

## Exhibit 9.

Copy.

The Indiana National Bank  
Indianapolis, Ind.

April 15th, 1938.

Mr. Paul C. Beardslee, Assistant Trust Officer,  
The Chase National Bank of New York  
11 Broad Street,  
New York City, New York.

Dear Mr. Beardslee:

Re: Indianapolis Gas Company Mortgage  
dated October 1, 1902.

Referring to your letter of April 11th we are enclosing,  
herewith, transcript of the Escrow Account of the Indian-  
apolis Gas Company.

Assuring you that we are glad to be of any service in  
the matter, we are,

Very truly yours,

RMF:EYG

R. M. Fletcher,  
Vice President & Cashier.

1371

## Exhibit 9.

Copy.

Statement of Your Account With  
The Indiana National Bank

The Indianapolis Gas Company.  
Escrow Account

Please Examine and Report any Differences at once.

Checks	Date	Deposits
Amount Brought Forward		
	Jul 1, 1936	60,000.00
	Sep 29, 1936	171,575.00
	Dec 31, 1936	60,000.00
	Mar 31, 1937	171,575.00
	Jun 30, 1937	60,000.00
	Sep 28, 1937	171,575.00
	Dec 30, 1937	60,000.00
	Mar 29, 1938	171,575.00

This Is Your Balance April 14, 1938 **\$926,300.00\***

1004

*Exhibit 10.*

1372

*Exhibit 10.*

Copy.

April 18, 1938

Mr. Arthur V. Brown, Vice President,  
Indianapolis Gas Company,  
Indianapolis, Indiana.

Indianapolis Gas Company Mortgage  
dated October 1, 1902.

Dear Sir:

In response to our inquiry to the Indiana National Bank as to whether the City of Indianapolis is making Escrow deposits in accordance with the March 2, 1936 Escrow Agreement, we have received from the Bank a transcript of the Escrow Account.

Apparently the sum of \$171,575. is being deposited semi-annually as a sum equivalent to six months' interest on the outstanding bonds, whereas our records indicate such deposit should be \$172,025. Should this difference be accounted for by eliminating the interest on the Treasury Bonds of the Indianapolis Gas Company, we believe that coupons appertaining to such bonds maturing October 1, 1936, April and October 1937, April 1, 1938 and subsequent coupon maturities for which funds are not deposited should be surrendered to us for cancellation.

Will you please give this matter your attention.

Yours very truly,

Paul C. Beardslee  
*Assistant Trust Officer.*

B-h

1373

Exhibit 11.

Copy

1004 Majestic Building,  
Indianapolis, Indiana  
April 20, 1938.

The Chase National Bank,  
Trust Department,  
11 Broad Street,  
New York, N. Y.

Attention: Mr. Paul C. Beardslee, Assistant Trust  
Officer.

Gentlemen:

We acknowledge your letter of April 18th in respect to the difference between the semi-annual interest on the outstanding bonds of our Company and the semi-annual escrow deposit which has been made on account thereof.

A statement of the outstanding bonds, unpaid interest and escrow deposits is enclosed.

The difference of \$450 between the semi-annual interest due and the escrow deposit made is the interest on eighteen of our bonds which are held in the treasury of the Citizens Gas and Coke Utility of the City of Indianapolis. We have taken up with them the question of having these coupons sent in for cancellation and will advise further as soon as we have their reply.

Yours very truly,

The Indianapolis Gas Company,  
By Arthur V. Brown,  
Vice President.



First Consolidated Mortgage, Five Per-Cent  
Gold Bonds of  
The Indianapolis Gas Company

Dated October 1, 1902—Due October 1, 1952

Total Authorized Issue		\$7,500,000.00	
Total Outstanding		\$6,881,000.00	
			Semi-Annual interest
Public .....	\$6,743,000.00	\$168,575.00	
I. G. Co. Treasury .....	120,000.00	3,000.00	
	\$6,863,000.00	\$171,575.00*	
Citizens Gas Co. now held by Citizens Gas & Coke Utility of the City of Indianapolis .			
	\$ 18,000.00	450.00**	
Total .....	\$6,881,000.00	\$172,025.00	
Escrow Deposits on account of Bond Interest due:			
October 1936 .....	\$171,575.00		
April 1937 .....	171,575.00		
October 1937 .....	171,575.00		
April 1938 .....	171,575.00		
	\$686,300.00		
No Deposit on account of Bond Interest Due on Bonds held by Citizens Gas & Coke Utility of the City of Indianapolis:			
October 1936 .....	\$ 450.00		
April 1937 .....	450.00		
October 1937 .....	450.00		
April 1938 .....	450.00		
		1,800.00	
Total Bond Interest due and unpaid .....		\$688,100.00	

\*Semi-Annual Escrow Deposit.

\*\*Semi-annual—No Deposit.

1375

**Exhibit 12.**

Copy

1004 Majestic Building,  
Indianapolis, Indiana.  
April 27, 1938.

The Chase National Bank,  
Trust Department,  
11 Broad Street,  
New York, New York

Attention: Mr. Paul C. Beardslee, Assistant Trust  
Officer

Gentlemen:

Please refer to your letter of April 18th and to our acknowledgment of April 20th in respect to the eighteen bonds for which no escrow deposit has been made in the amount of the coupons which are due and unpaid subsequent to April 1, 1936.

As stated in our letter of April 20th, these bonds are held in the treasury of the Citizens Gas and Coke Utility of the Department of Utilities of the City of Indianapolis. They now advise they see no reason for sending these coupons in for cancellation at this time but will make proper disposition of the same when the other coupons are paid.

Yours very truly,  
The Indianapolis Gas Company,  
By Wm. Y. Yule,  
*Secretary.*

1008

*Exhibits 12-A-B.*

1376

Exhibit 12-A.

Copy.

October 26, 1938.

3-27-645

The Indiana National Bank,  
Indianapolis, Indiana.

Attention: Mr. R. M. Fletcher, Vice President and  
Cashier.

Re: The Indianapolis Gas Company Mortgage  
dated October 1, 1902.

Gentlemen:

For the purpose of our records as Trustee under the above mortgage, we would appreciate your advising whether all "escrow deposits" have been made since your letter of April 15, 1938 in accordance with the stipulations of agreement of March 2, 1936 between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and the Indianapolis Gas Company.

Thanking you in advance for your kind cooperation in this matter, we are,

Yours very truly,  
Paul B. Beardslee,  
*Assistant Trust Officer.*

1377

Exhibit 12-B.

Copy.

The Indiana National Bank,  
Indianapolis, Ind.

October 29, 1938.

Mr. Paul C. Beardslee, Asst. Trust Officer,  
The Chase National Bank of New York,  
11 Broad Street,  
New York, New York.

Re: The Indianapolis Gas Company Mortgage  
dated October 1, 1902.

Dear Mr. Beardslee:

We acknowledge receipt of your letter of October 26th, and wish to advise that all "Escrow Deposits" have been

made since our letter of April 15, 1938, in accordance with the stipulations of agreement of March 2, 1936 between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and the Indianapolis Gas Company.

We assure you that it is a pleasure to be of any service to you in this connection.

Very truly yours,

(Signed) R. M. Fletcher,

Vice President & Cashier.

RMF/clf

1378-1389

• • • •

(Exhibits 13 to 24, inclusive, to plaintiff's answers to the interrogatories propounded to it appear elsewhere in the record as follows:

Exhibit to Plaintiff's Answers No.

Appears in the Record as Plaintiffs' Exhibit No.

13

111A

14

111B

15

111C

16

112

17

112A

18-24, inclusive

113-119, inclusive.)

(Inserted pursuant to stipulation filed November 22, 1939.)

1390-1441

• • • •

(g) In place of Exhibits 25 to 45 insert:

(Exhibits 25 to 45, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties.)

## CITY'S EXHIBIT 7-A.

Indianapolis, Indiana,  
September 26, 1935.

Minutes of a Special Meeting of the Board of Directors  
of

The Indianapolis Gas Company.

A called meeting of the Board of Directors of The Indianapolis Gas Company was held on Thursday, September 26, 1935, at 12:30 o'clock P. M.

Present: Messrs. Appel, Brown, Ewbank, Higgins and Irwin.

Absent: Mr. Reilly.

The meeting was called to order by the President, Mr. Irwin, who stated its purpose was to consider certain communications from the City of Indianapolis by the Board of Directors for Utilities in respect to the property of the Company leased to the Citizens Gas Company of Indianapolis, as follows:

"(Here follows copy of letter of July 23, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 58.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • •  
"(Here follows copy of letter of August 31, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 59.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • •  
"(Here follows copy of letter of September 9, 1935, which letter appears above as City's Stipulation Exhibit 60.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • •  
"(Here follows copy of resolution for rejection of assignment of lease, rejection of assignment of lease, and resolution for temporary use of property of Indianapolis Gas Company, copies of which are attached to the answer

and counterclaim of the City of Indianapolis, et al. as Exhibit C (I. R. 200-204.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

The Indianapolis Gas Company  
1004 Majestic Building  
Indianapolis, Indiana

Gentlemen:

Herewith we tender you the sum of \$4,780.80, which we understand is equivalent to the amount due and owing by you for the third installment of your Federal Income Tax for the year 1934 payable in 1935.

This sum is tendered you as a payment on account of temporary use and occupancy of your property by the City of Indianapolis pursuant to the certain resolution, entitled "Resolution for Temporary Use of Property of The Indianapolis Gas Company" adopted by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, Indiana, on September 9, 1935; a copy of which resolution was that day transmitted to you.

Said sum is not tendered you under or on account of the certain lease between you and Citizens Gas Company of Indianapolis dated September 30, 1913, or any assignment thereof. The City of Indianapolis is not acting under said lease, or any assignment thereof, and has not recognized and does not recognize said lease as an obligation in any respect, either binding upon the City or upon any property acquired by the City from said Citizens Gas Company of Indianapolis.

If you do not accept this tendered payment or acquiesce in the temporary use of your property by the City of Indianapolis pursuant to said resolution, please inform the Board of Directors for Utilities of the City of Indianapolis accordingly.

Dated at Indianapolis, Indiana, September 14, 1935.

Board of Directors for Utilities  
of the City of Indianapolis,  
By Henry L. Dithmer.

Letter and check were returned personally by the Secretary with oral statement that it was outside his authority to accept same.

• • • • •  
"(Here follows copy of letter of September 24, 1935,

which letter appears above as City's Stipulation Exhibit 62.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

. . . . .

Letter and check returned personally by the Secretary without comment.

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 61.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

. . . . .

Letter and check returned personally by the Secretary without comment.



made since our letter of April 15, 1938, in accordance with the stipulations of agreement of March 2, 1936 between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and the Indianapolis Gas Company.

We assure you that it is a pleasure to be of any service to you in this connection.

Very truly yours,

(Signed) R. M. Fletcher,  
*Vice President & Cashier.*

RMF/clf

1378-1389

(Exhibits 13 to 24, inclusive, to plaintiff's answers to the interrogatories propounded to it appear elsewhere in the record as follows:

Exhibit to Plain-  
tiff's Answers No.

Appears in the Record as  
Plaintiffs' Exhibit No.

13

111A

14

111B

15

111C

16

112

17

112A

18-24, inclusive

113-119, inclusive.)

(Inserted pursuant to stipulation filed November 22, 1939.)

1390-1441

(g) In place of Exhibits 25 to 45 insert:

(Exhibits 25 to 45, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties.)

### CITY'S EXHIBIT 7-A.

Indianapolis, Indiana,  
September 26, 1935.

Minutes of a Special Meeting of the Board of Directors  
of  
The Indianapolis Gas Company.

A called meeting of the Board of Directors of The Indianapolis Gas Company was held on Thursday, September 26, 1935, at 12:30 o'clock P. M.

Present: Messrs. Appel, Brown, Ewbank, Higgins and Irwin.

Absent: Mr. Reilly.

The meeting was called to order by the President, Mr. Irwin, who stated its purpose was to consider certain communications from the City of Indianapolis by the Board of Directors for Utilities in respect to the property of the Company leased to the Citizens Gas Company of Indianapolis, as follows:

"(Here follows copy of letter of July 23, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 58.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

"(Here follows copy of letter of August 31, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 59.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

"(Here follows copy of letter of September 9, 1935, which letter appears above as City's Stipulation Exhibit 60.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

"(Here follows copy of resolution for rejection of assignment of lease, rejection of assignment of lease, and resolution for temporary use of property of Indianapolis Gas Company, copies of which are attached to the answer and counterclaim of the City of Indianapolis, et al. as Exhibit C (I. R. 200-204.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 62.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 61.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

Letter and check returned personally by the Secretary without comment.

On motion of Mr. Brown, seconded by Mr. Appel, the following resolution was unanimously adopted.

Whereas, The Board of Directors for Utilities of the City of Indianapolis, through its counsel, have addressed several communications to this Company, its Officers or its Directors, relative to their attitude in respect to the lease executed by this Company to the Citizens Gas Company of Indianapolis on September 30, 1913; and

Whereas, It is the opinion of this Board that special counsel should be employed by the Company in the controversy thus presented;

Therefore Be It Resolved, That Messrs. Ewbank and Higgins of this Board be authorized and directed to visit Cleveland, Ohio, and endeavor to secure the services of Mr. Newton D. Baker as special counsel to the Company in the controversy presented.

On motion of Mr. Brown, seconded by Mr. Ewbank, the meeting was adjourned to 10:00 o'clock A. M., Monday, September 30, 1935.

William E. Irwin,  
*Chairman.*

Wm. J. Yule,  
*Secretary.*

#### CITY EXHIBIT 7-B.

Indianapolis, Indiana,  
September 30, 1935.

#### Minutes of Adjourned Meeting of the Board of Directors of The Indianapolis Gas Company.

The Board of Directors of The Indianapolis Gas Company met on Monday morning, September 30, 1935, at 10:00 o'clock, pursuant to adjournment from September 26th.

Present: Messrs. Appel, Brown, Ewbank, Higgins and Irwin.

Absent: Mr. Reilly.

The meeting was called to order by the President, Mr. Irwin.

Thereupon Messrs. Ewbank and Higgins reported that they had, pursuant to the directions of the Board, interviewed Mr. Newton D. Baker at Cleveland, Ohio, on September 28th, and in conference with him had presented all available facts surrounding the lease and the communica-

tions received from the Board of Directors for Utilities of the City of Indianapolis in respect thereto, and that Mr. Baker had accepted employment by the Company as special counsel in the matter.

On motion of Mr. Ewbank, seconded by Mr. Brown, the following resolution was unanimously adopted.

Whereas, The Board of Directors for Utilities of the City of Indianapolis, through its counsel, Messrs. Thompson, Rabb & Stevenson, has addressed several communications to this Company, its Officers or its Directors, in respect to the lease executed by this Company to the Citizens Gas Company of Indianapolis on September 30, 1913:

Therefore Be It Resolved, That the Secretary of this Company be directed to execute and deliver the following letter to Messrs. Thompson, Rabb & Stevenson, Counsel for the Board of Directors for Utilities of the City of Indianapolis:

"(Here follows copy of letter of September 30, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 66)".

(Inserted pursuant to stipulation filed November 22, 1939.)

The letter was executed by the Secretary and delivered to Mr. W. H. Thompson, of Thompson, Rabb & Stevenson, whereupon the following letter was received in reply thereto.

"(Here follows copy of letter of September 30, 1935, which letter appears above as City's Stipulation Exhibit 64)".

(Inserted pursuant to stipulation filed November 22, 1939.)

On motion of Mr. Ewbank, seconded by Mr. Brown, the following resolution was unanimously adopted:

Resolved, That the Secretary of this Company be directed to execute and deliver the following letter:

"(Here follows copy of letter of September 30, 1935, which letter appears above as City's Stipulation Exhibit 65)".

(Inserted pursuant to stipulation filed November 22, 1939.)

There being no further business, on motion duly seconded, the meeting adjourned.

Wm. J. Yule,  
*Secretary.*

William E. Irwin,  
*Chairman.*

CITY'S EXHIBIT 7-C.

Indianapolis, Indiana,  
November 6, 1935.

Minutes of a Special Meeting of the Board of Directors  
of The Indianapolis Gas Company.

Pursuant to the call of the President, the Board of Directors of The Indianapolis Gas Company met on Wednesday, November 6, 1935, at twelve o'clock noon.

Present: Messrs. Appel, Brown, Ewbank, Higgins, Irwin and Reilly.

Absent: None.

The meeting was called to order by the President, Mr. Irwin.

On motion of Mr. Reilly, seconded by Mr. Brown, the following resolution was unanimously adopted:

Resolved, That the Secretary of the Company be instructed to formally notify The Chase National Bank of New York, as Trustee of the First Mortgage Bonds of The Indianapolis Gas Company, of the refusal of the City of Indianapolis to accept the assignment of the ninety-nine year lease made and executed in 1913 between this Company and the Citizens Gas Company of Indianapolis, and to further advise said Bank, Trustee, of the formal developments and situations surrounding the present operation of the Company's property, by sending them a letter stating substantially as follows:

"(Here follows a form of letter from The Indianapolis Gas Company to the Chase National Bank Company, which is identical with the letter of November 7, 1935, a copy of which is set forth as Plaintiffs' Exhibit 116)".

(Inserted pursuant to stipulation filed November 22, 1939.)

There being no further business, on motion duly seconded, the meeting adjourned.

William E. Irwin,  
*Chairman.*

Wm. J. Yule,  
*Secretary.*

## CITY EXHIBIT 7-D.

Indianapolis, Indiana,  
March 4, 1936.

Minutes of a Called Meeting of the Board of Directors of  
The Indianapolis Gas Company.

The Board of Directors of The Indianapolis Gas Company met on call of the President, Wednesday, March 4, 1936, at twelve o'clock noon.

Present: Messrs. Brown, Ewbank, Higgins, Irwin and Smith.

Absent: Messrs. Appel and Reilly.

The meeting was called to order by Mr. Irwin, President.

Minutes of the last meeting, January 15, 1936, were read and approved.

The following agreement executed March 2, 1936, by the Officers of the Company with the Department of Utilities of the City of Indianapolis was offered for approval of the Board Directors.

“(Here appears a copy of the agreement of March 2, 1936 between The Indianapolis Gas Company and the Department of Utilities of the City of Indianapolis, a copy of which appears as part of Exhibit E to the answer and counter-claim of the City of Indianapolis, et al. (I. R. 205-207)”).

(Inserted pursuant to stipulation filed November 22, 1939.)

Mr. Ewbank offered the following resolution and moved its adoption.

Resolved, That the action of the Officers of this Company in executing on March 2, 1936, the agreement with the Department of Utilities of the City of Indianapolis be, and it is, hereby approved, ratified and confirmed.

The motion was seconded by Mr. Brown, whereupon the resolution was unanimously adopted.

There being no further business, on motion of Mr. Higgins, seconded by Mr. Smith, the meeting adjourned.

William E. Irwin,  
*Chairman.*

Wm. J. Yule,  
*Secretary.*

CITY'S EXHIBIT NO. 7-E.

Indianapolis, Indiana,  
April 3, 1936.

Minutes of a Called Meeting of the Board of Directors  
of  
The Indianapolis Gas Company

Pursuant to call of the President, the Board of Directors of The Indianapolis Gas Company met on Friday, April 3, 1936, at 3:30 P. M.

Present: Messrs. Brown, Ewbank, Higgins, Irwin and Reilly.

Absent: Messrs. Appel and Smith.

The meeting was called to order by the President, Mr. Irwin, who stated the purpose of the meeting was to consider a letter received from Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, which letter is as follows:

• • • • •  
“(Here appears a copy of letter dated March 20, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is set forth as City's Stipulation Exhibit 78).”

(Inserted pursuant to stipulation filed November 22, 1939.)

On motion of Mr. Higgins, seconded by Mr. Ewbank, the following resolution was unanimously adopted.

Resolved, That the Secretary of this Company be, and he is hereby directed to acknowledge the letter dated March 20, 1936, addressed to this Company by Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, by transmitting to them the following letter which is hereby approved and authorized by this Board:

• • • • •  
“(Here follows a form of letter from the Indianapolis Gas Company to Thompson, Rabb & Stevenson, which is identical with the letter of April 6, 1936, a copy of which is set forth as City's Stipulation Exhibit 79).”

(Inserted pursuant to stipulation filed November 22, 1939.)

There being no further business, on motion duly seconded, the meeting adjourned.

Wm. J. Yule,

Secretary.

William F. Irwin,  
Chairman.



## CITY'S EXHIBIT NO. 7-G.

Indianapolis, Indiana,  
June 3, 1936.

Minutes of a Called Meeting of the Board of Directors  
of  
The Indianapolis Gas Company

A called meeting of the Board of Directors of The Indianapolis Gas Company was held at twelve o'clock noon on Wednesday, June 3, 1936.

Present: Messrs. Appel, Brown, Ewbank, Higgins, Irwin, Reilly and Smith.

Absent: None.

The meeting was called to order by the President, Mr. Irwin.

Minutes of meetings held March 4, April 3 and May 12 were read and approved.

There was offered for consideration a letter from Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, in respect to a main extension agreement, which letter is as follows:

• • • • •  
“(Here appears a copy of letter dated May 23, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is set forth as City's Stipulation Exhibit 82).”

(Inserted pursuant to stipulation filed November 22, 1939.)

On motion of Mr. Higgins, seconded by Mr. Ewbank, the Secretary was instructed to send in reply the following letter to Messrs. Thompson, Rabb & Stevenson:

• • • • •  
“(Here appears a copy of letter dated June 3, 1936 from The Indianapolis Gas Company to Thompson, Rabb & Stevenson, a copy of which is set forth as City's Stipulation Exhibit 84).”

(Inserted pursuant to stipulation filed November 22, 1939.)

There being no further business, on motion duly seconded, the meeting adjourned.

William F. Irwin.  
*Chairman.*

Wm. J. Yule,  
*Secretary.*

1412

## CITY'S EXHIBIT 8.

## General Ordinance No. 82—1935.

An Ordinance concerning acquisition by the City of Indianapolis of the plant and property of Citizens Gas Company of Indianapolis, Indiana, and matters connected therewith.

• • • • •  
“(The part here omitted recites in appropriate ‘Whereas’ clauses certain historical facts in regard to Citizens Gas Company and its relationship to the City of Indianapolis, which appear elsewhere in this record).”

(Inserted pursuant to stipulation filed November 22, 1939.)

1414 Whereas on June 29, 1935 the City, by and through the Board of Directors for Utilities of the Department of Public Utilities of said City advanced and paid to said Citizens Gas Company the sum of \$3,550,000, in trust for the purpose of redeeming and retiring all outstanding preferred stock of said Company and of paying and cancelling the certificates representing all outstanding common stock of the Company as provided in said franchise contract and the amended Articles of Incorporation of said Company, such sum so advanced and paid being sufficient for said purpose, which said fund was provided from the sale  
1415 by said Board of Directors for Utilities of revenue bonds payable solely and exclusively out of revenues to be derived from the operation of said gas plant and property when acquired by said City, all as authorized by Chapters 77 and 78 of the Acts of 1929, Chapter 67 of the Acts of 1931, and Chapter 125 of the Acts of 1933 as amended by Chapter 311 of the Acts of 1935, of the General Assembly of the State of Indiana; and

Whereas thereafter on September 9, 1935 the plant and property of said Citizens Gas Company, as referred to in and contemplated by said franchise contract of 1905, was, by instruments of conveyance and assignment duly executed by the proper officers of said Company on authority of resolutions adopted by the Board of Directors and Board of Trustees of said Company, conveyed, assigned, transferred and delivered to the City of Indianapolis, subject to such of the legal obligations of said Company as the City of Indianapolis, under the terms of said franchise contract and of said public charitable trust, was bound to ac-

cept or recognize as a charge against such plant and property, (the City of Indianapolis expressly rejecting a tendered assignment of a lease between the Indianapolis Gas Company and said Citizens Gas Company, and refusing to recognize said lease as an obligation binding upon the City) which said instruments of conveyance and assignment were on said date of execution and delivery duly recorded in the office of the Recorder of Marion County, Indiana, in Deed Record 937 and Miscellaneous Record 265, respectively; and

Whereas prior to such conveyance, assignment, transfer and delivery of said plant and property of Citizens Gas Company to the City of Indianapolis, all notices to and demands upon Citizens Gas Company, its directors and trustees, and all other steps, conditions and things necessary or required by said franchise contract, by said public charitable trust or by the statutes of Indiana, to be done prece-

dent to or in connection with the taking over of such 1416 plant and property, were, as this Common Council does now find, determine and declare, duly and fully given, made, done, performed, and executed for and in behalf of the City of Indianapolis by the Board of Public Works, the Board of Directors for Utilities and other proper officials of said City; and

Whereas the acquisition of said plant and property of the Citizens Gas Company, as contemplated in said franchise contract of 1905 and pursuant to the public charitable trust existing therein, is and will be to the advantage, benefit and welfare of the City of Indianapolis and its inhabitants and the consumers of gas therein; now therefore

Be It Ordained by the Common Council of the City of Indianapolis;

Section 1. That the acquisition and taking over of the plant and property of the Citizens Gas Company of Indianapolis, Indiana, on the 9th day of September, 1935, for and in behalf of the City of Indianapolis, by the Board of Directors for Utilities of said City, including the acceptance of deed of conveyance of real estate and assignments of personal property, and the rejection of an assignment of the certain lease from the Indianapolis Gas Company, and its refusal to recognize said lease as an obligation binding upon the City, and all acts, steps and proceedings whatsoever relating to such matter as on said date and theretofore done and taken, be and is hereby in all things ratified, approved, adopted and confirmed; and that the public charitable trust in all such plant and property so delivered

to and as accepted by said Board of Directors for Utilities be and is hereby received and accepted, and the City of Indianapolis hereby agrees to the conditions and terms accompanying such trust and acknowledges itself bound to carry them out.

1417    Sec. 2. This Ordinance, shall be in full force and effect from and after its passage.

•                    •                    •                    •                    •

“(Certificate of City Clerk omitted in printing).”  
(Inserted pursuant to stipulation filed November 22, 1939.)

**CITY'S EXHIBIT 9.**

1418    •                    •                    •                    •                    •

“(This exhibit entitled ‘Rejection of Assignment of Lease and Refusal to Assume, Take Over, or be Bound Thereby’ appears as part of paragraph 5 of the Resolution for Rejection of Assignment of Lease which is part of Exhibit C to the answer and counterclaim of City of Indianapolis, et al. (I R. 203-4)).”  
(Inserted pursuant to stipulation filed November 22, 1939.)

## CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co., for use of Property—Accrued  
Amount Equal to Stock Interest

Account No. 621

1020

City's Exhibit 10.

Date 1935	Items	Folio	✓	Debits	Date 1935	Items	Folio	✓	Credits
Dec. 31		J445	✓	✓% 37,333.33	Sept. 30	J 23			7,333.33
					Oct. 31	J 30			10,000.00
					Nov. 30	J 39			10,000.00
					Dec. 31	J 43			10,000.00
				<u>37,333.33</u>					<u>37,333.33</u>
					1936				
					Jan. 31	J623			10,000.00
					Febr. 29	J 67			10,000.00
					Mar. 31	J 72			10,000.00
					Apr. 30	J 77			10,000.00
					May 31	J 83			10,000.00
					June 30	J 87			10,000.00
					July 31	J 93			10,000.00
					Aug. 31	J 99			10,000.00
					Sept. 30	J103			10,000.00
					Oct. 30	J108			10,000.00
					Nov. 30	J113			10,000.00
					Dec. 31	J118			10,000.00
	Balance			120,000.00					<u>120,000.00</u>
				<u>120,000.00</u>					
					1937				
					Jan. 1	Balance			120,000.00
					31	J136			10,000.00
					Feb. 28	J140			10,000.00

			Feb. 28	J140	10,000.00
			Mar. 31	J144	10,000.00
			Apr. 30	J149	10,000.00
			May 31	J153	10,000.00
			June 30	J157	10,000.00
			July 31	J161	10,000.00
			Aug. 31	J164	10,000.00
			Sept. 30	J166	10,000.00
			Oct. 31	J170	10,000.00
			Nov. 30	J174	10,000.00
			Dec. 31	J178	10,000.00
	Balance	240,000.00			
		240,000.00			240,000.00
1938			1938		
			Jan. 1	Balance Fwd.	240,000.00
24					Sheet No. 2
			Jan. 1	Balance Brot Fwd.	240,000.00
			31	J197	10,000 —
			Feb. 28	J200	10,000 —
			Mar. 31	J202	10,000 —
			Apr. 30	J205	10,000 —
			May 31	J208	10,000 —
			June 30	J214	10,000 —
			July 31	J217	10,000 —
			Aug. 31	J220	10,000 —
			Sept. 30	J223	10,000 —
			Oct. 31	J225	10,000
			Nov. 30	J230	10,000
	Balance	360,000.00	Dec. 31	J233	10,000 —
		360,000.00			360,000 —
			1939		
			Jan. 1	Balance	360,000.00

City Exhibit 10.

1021

## CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co. for use of Property—Accrued  
Amount Equal to Bond Interest

Account No. 622

1022

Date 1935	Items	Folio	✓	Debits	Date 1935	Items	Folio	✓	Credits
Sept. 30		J24-25		20,970.28	Sept. 30	J 23			20,970.28
					Oct. 31	J 30			28,595.83
					Nov. 30	J 39			28,595.83
	Balance			85,787.49	Dec. 31	J 43			28,595.83
				<u>106,757.77</u>					<u>106,757.77</u>
<u>1936</u>					<u>1936</u>				
Mar. 31		J 73		171,575.00	Jan. 1	Balance			85,787.49
					31	J62-3			28,595.83
					Febr. 29	J 67			28,595.83
					Mar. 31	J 72			28,595.85
					Apr. 30	J 77			28,595.83
					May 31	J 83			28,595.83
					June 30	J 87			28,595.83
					July 31	J 93			28,595.83
					Aug. 31	J 99			28,595.83
					Sept. 30	J103			28,595.85
					Oct. 31	J108			28,595.83
	Balance			257,362.49	Nov. 30	J113			28,595.83
				<u>428,937.49</u>	Dec. 31	J118			28,595.83
									<u>428,937.49</u>
					<u>1937</u>				
					Jan. 1	J136			257,362.49
					31				28,595.83
					Febr. 28				

City's Exhibit 10.



Feb  
Ma  
Apr  
Ma  
Jun  
July  
Aug  
Sep  
Oct  
Nov  
Dec

Balance

600,512.49

600,512.49

26

Jan

19

Jan  
"

Feb  
Ma  
Apr  
Ma  
Jun  
July  
Aug  
Sep  
Oct  
Nov  
Dec

Balance

943,662.49

943,662.49

1  
Jan

or. 28	J140	28,595.83
r. 31	J144	28,595.85
t. 30	J149	28,595.83
y 31	J153	28,595.83
e 30	J157	28,595.83
y 31	J161	28,595.83
g. 31	J164	28,595.83
ot. 30	J166	83,595.85
. 31	J170	28,595.83
w. 30	J174	28,595.83
c. 31	J178	28,595.83

---



---

600,512.49

. 1, 1938      Balance Fwd.      600,512.49

938      Sheet No. 2

1	Balance Brot Fwd.	600,512.49
31	J197	28,595.83
or. 28	J200	28,595.83
r. 31	J202	28,595.85
t. 30	J205	28,595.83
y 31	J208	28,595.83
e 30	J214	28,595.83
y 31	J217	28,595.83
g. 31	J220	28,595.83
ot. 30	J223	28,595.85
. 31	J225	28,595.83
w. 30	J230	28,595.83
c. 31	J233	28,595.83

---



---

943,662.49

939      1      Balance      943,662.49

*City's Exhibit 10.*

1023

27

Sheet No. 1

## CITY'S EXHIBIT No. 10

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co., for use of Property—Accrued  
Amount Equal to State and Local Taxes

Account No. 623

Date 1935	Items	Folio	✓	Debits	Date 1935	Items	Folio	✓	Credits
					Sept. 30	J 23			6,479.53
					Oct. 31	J 30			8,639.44
					Nov. 30	J 39			8,050.44
					Dec. 31	J 43			8,050.44
	Balance			102,554.87	Dec. 31	J52-3			71,335.02
				102,554.87					102,554.87
<hr/>					<hr/>				
1936					1936				
May 31		J 83		51,361.24	Jan. 1	Balance			102,554.87
Oct. 31		J108		51,193.63	31	J62-3			8,600.00
					Febr. 29	J 67			8,600.00
					Mar. 31	J 72			8,600.00
					Apr. 30	J 77			8,600.00
					May 31	J 83			8,600.00
					June 30	J 87			8,600.00
					July 31	J 93			8,600.00
					Aug. 31	J 99			8,600.00
					Sept. 30	J103			8,600.00
					Oct. 31	J108			8,600.00
					Nov. 30	J113			8,600.00
	Balance			110,005.85	Dec. 31	J118			8,600.00
				212,560.72	31	J122			6,805.85
									212,560.72
<hr/>					<hr/>				
1937					1937				
Apr. 30		J149		55,002.94	Jan. 1				110,005.85
Oct. 31		J168		55,002.91	31	J136			9,200.00
					Febr. 28	J140			10,000.00

1024

City's Exhibit 10.

				Mar. 31
				Apr. 30
				May 31
				June 30
				July 31
				Aug. 31
				Sept. 30
				Oct. 31
				Nov. 30
Nov. 30	Fwd.		110,005.85	
28				
Nov. 30	Brot Fwd.		110,005.85	Nov. 30
Dec. 31		J182	1,033.58	Dec. 31
	Balance		118,166.42	
			229,205.85	
1938				1938
Apr. 30		J206	59,083.24	Jan. 1
Nov. 30		J228	59,083.20	" 31
Dec. 31		J237	3,029.55	Feb. 28
				Mar. 31
				Apr. 30
				May 31
				June 30
				July 31
				Aug. 31
				Sept. 30
				Oct. 31
				Nov. 30
	Balance		116,970.43	Dec. 31
			238,166.42	

J144	10,000.00
J149	10,000.00
J153	10,000.00
J157	10,000.00
J161	10,000.00
J164	10,000.00
J166	10,000.00
J170	10,000.00
J174	10,000.00

Fwd.	219,205.85
	Sheet No. 2
Brot Fwd.	219,205.85
J178	10,000.00
	229,205.85

Balance	118,166.42
J197	10,000 —
J200	10,000 —
J202	10,000 —
J205	10,000 —
J208	10,000 —
J214	10,000 —
J217	10,000 —
J220	10,000 —
J223	10,000 —
J225	10,000 —
J230	10,000 —
J233	10,000 —
	238,166.42

1939	
Jan. 1	Balance 116,970.43

## CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

1026

Gen. Ledger Acct.—Amounts Due I. G. Co., for use of Property—Accrued  
Amount Equal to Federal Taxes

Account No. 624

Date 1935	Items	Folio	✓	Debits	Date 1935	Items	Folio	✓	Credits
Sept. 30	J24-25		✓	1,168.64	Sept. 30	J 23			1,168.64
Dec. 31	J44-5		✓	4,780.79	Oct. 31	J 30			1,593.60
					Nov. 30	J 39			1,593.60
					Dec. 31	J 43			1,593.59
				<u>5,949.43</u>					<u>5,949.43</u>
1936					1936				
Mar. 31	J 73			4,782.36	Jan. 31	J62-3			1,593.60
June 30	J 88			4,782.36	Feb. 29	J 67			1,593.60
Sept. 30	J104			4,782.36	Mar. 31	J 72			1,595.16
Dec. 31	J119			4,782.36	Apr. 30	J 77			1,593.60
					May 31	J 83			1,593.60
					June 30	J 87			1,595.16
					July 31	J 93			1,595.16
					Aug. 31	J 98			1,593.60
					Sept. 30	J103			1,593.60
					Oct. 31	J108			1,593.60
					Nov. 30	J113			1,593.60
					Dec. 31	J118			1,595.16
				<u>19,129.44</u>					<u>19,129.44</u>
					1937				
					Jan. 31	J136			1,592.60
					Feb. 29	J140			1,593.60
					Mar. 31	J144			1,595.16

City's Exhibit 10.

		Mar. 31	J144	1,595.16
		Apr. 30	J149	1,593.60
		May 31	J153	1,593.60
		June 30	J157	1,595.16
		July 31	J161	1,593.60
		Aug. 31	J164	1,593.60
		Sept. 30	J166	1,595.16
		Oct. 31	J170	1,593.60
		Nov. 30	J174	1,593.60
		Dec. 31	J178	1,595.16
	Balance	19,129.44		
		19,129.44		19,129.44

		1938		
		Jan. 1	Balance Fwd.	19,129.44
30				Sheet No. 2
		Jan. 1	Balance Brot. Fwd.	19,129.44
		Jan. 31	J197	1,593.60
		Feb. 28	J260	1,593.60
		Mar. 31	J202	1,595.16
		Apr. 30	J205	1,593.60
		May 31	J208	1,593.60
		June 30	J214	1,595.16
		July 31	J217	1,593.60
		Aug. 31	J220	1,593.60
		Sept. 30	J223	1,595.16
		Oct. 31	J225	1,595.16
		Nov. 30	J230	1,593.60
		Dec. 31	J233	1,593.60
	Balance	38,258.88		
		38,258.88		38,258.88
		1939		
		Jan. 1	Balance	38,258.88

City's Exhibit 10.

1027

31  
Sheet No. 1

CITY'S EXHIBIT No. 10  
Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co., for use of Property—Accrued  
Amount Equal to Other Items

Account No. 625

Date 1935	Items	Folio	✓	Debits	Date 1935	Items	Folio	✓	Credits
Dec. 31		J445	✓	93.33	Sept. 30	J 23			18.33
					Oct. 31	J 30			25.00
					Nov. 30	J 39			25.00
					Dec. 31	J 43			25.00
	Balance			1,140.65	Dec. 31	J 45			1,140.65
				<u>1,233.98</u>					<u>1,233.98</u>
1936					1936				
Jan. 31		J 61	✓	1,140.66	Jan. 1	Balance			1,140.65
					31	J 63			25.00
					Feb. 29	J 67			25.00
					Mar. 31	J 72			25.00
					Apr. 30	J 77			25.00
					May 31	J 83			25.00
					June 30	J 87			25.00
					July 31	J 93			25.00
					Aug. 31	J 99			25.00
					Sept. 30	J103			25.00
					Oct. 31	J108			25.00
					Nov. 30	J113			25.00
					Dec. 31	J118			25.00
	Balance			300.00	31	J120			.01
				<u>1,440.66</u>					<u>1,440.66</u>
					1937				
					Jan. 1				300.00
					31	J136			25.00
					Feb. 28	J140			25.00
					May 31	J144			25.00

1028

City's Exhibit 10.



			Apr. 30	J149	25.00
			May 31	J153	25.00
			June 30	J157	25.00
			July 31	J161	25.00
			Aug. 31	J164	25.00
			Sept. 30	J166	25.00
			Oct 31	J170	25.00
			Nov. 30	J174	25.00
			Nov. 30	Fwd.	575.00
32			1937		Sheet No. 2
Nov. 30	Balance	—	Nov. 30	Brot. Fwd.	575.00
		600.00	Dec. 31	J178	25.00
		600.00			600.00
			1938		
			Jan. 1	Balance	600.00
			Jan. 31	J197	25.00
			Feb. 28	J200	25 —
			Mar. 31	J202	25 —
			Apr. 30	J205	25 —
			May 31	J208	25 —
			June 30	J214	25 —
			July 31	J217	25 —
			Aug. 31	J220	25 —
			Sept. 30	J223	25 —
			Oct. 30	J225	25 —
			Nov. 30	J230	25 —
	Balance	900 —	Dec. 31	J233	25 —
		900 —			900 —
			1939		
			Jan. 1	Balance	900 —

33

## CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts to Indianapolis Gas Co., for use of Property  
Amount Equal to Indiana Gross Income Taxes

Account No. 954

Date 1935	Items	Folio	✓	Debits	Date 1935	Items	Folio	✓	Credits
Oct. 31		J 31		1,772.46	Dec. 31		J 55		2,913.11
Dec. 31		J 45		1,140.65					
				<u>2,913.11</u>					<u>2,913.11</u>
<u>1936</u>					<u>1936</u>				
Apr. 30		J 78		1,778.25	Dec 31		J131		1,778.25

## CITY'S EXHIBIT No. 10

Sheet No. 1

## Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts to Indianapolis Gas Co., for use of Property      Account No. 959  
 Amount Equal to Miscellaneous Charges

Date 1935	Items	Folio	✓	Debits	Date 1935	Items	Folio	✓	Credits
1935					1935				
Oct. 31		J31		421.44	Dec. 31	J 55			421.44
1936					1936				
Jan. 31		J 61		277.10	Dec. 31	J131			698.55
Apr. 30		J 78		421.44					
Dec. 31		J120		.01					
				<u>698.55</u>					<u>698.55</u>

City's Exhibit 10.

1031

## CITY'S EXHIBIT NO. 11.

Transcript.

The Department of Public Utilities  
Indianapolis, Indiana

City of Indianapolis Gas Plant Revenue Bonds  
\$8,000,000.00

Dated June 1, 1935

Proceedings of Board of Trustees for Utilities and Board  
of Directors for Utilities and Various Certificates.  
(In Quadruplicate)

• • • • •

MINUTES OF A MEETING OF THE BOARD OF DI-  
RECTORS FOR UTILITIES HELD JUNE 5, 1935.

A meeting of the Board of Directors for Utilities for the City of Indianapolis was held on Wednesday, June 5, 1935, at 2 o'clock P. M. at 1350 Consolidated Building, Indianapolis, Indiana.

Present: Messrs. Dithmer, Jungelaus, Elsey, Sahm and Woodward.

Upon motion duly made, seconded and unanimously adopted, The Union Trust Company of Indianapolis was designated as one of the paying agents for the proposed City of Indianapolis Gas Plant Revenue Bond issue, a bid for which by Halsey Stuart & Co. and Otis & Company was accepted on May 29, 1935.

Upon motion duly made, seconded and unanimously adopted, The Cleveland Trust Company of Cleveland, Ohio, was designated as another paying agent under said bond issue and the offices of Halsey Stuart & Company at Chicago, Illinois and in New York City were likewise designated.

Upon motion duly made, seconded and unanimously adopted, the following form for such bonds was approved, viz.:

## UNITED STATES OF AMERICA,

State of Indiana, County of Marion,  
City of Indianapolis.

No. ....

.....1,000

## City of Indianapolis Gas Plant Revenue Bond.

The City of Indianapolis, in Marion County, State of Indiana, for value received, hereby promises to pay to the bearer, or if this bond be registered then to the registered holder, solely out of the revenues derived from operation of its gas utility system, the principal sum of One Thousand Dollars on the first day of June, 19....., and to pay interest thereon from the date hereof until the principal is paid at the rate of four and one-half per cent ( $4\frac{1}{2}\%$ ) per annum, payable on the first day of December, 1935, and semi-annually thereafter on the first day of June and December in each year, upon presentation and surrender of the annexed coupons as they severally become due. Both principal and interest of this bond are payable at The Union Trust Company, in the City of Indianapolis, Indiana, or, at the option of the holder, at The Cleveland Trust Company, in the City of Cleveland, State of Ohio, or at the offices of Halsey, Stuart & Co., in the City of Chicago, State of Illinois and in the City of New York, State of New York, in such funds as are, on the respective dates of payment of the principal of and interest on the bonds, legal tender in the United States of America for such purposes.

This bond is one of an issue of eight thousand bonds of the City of Indianapolis, Indiana, of like date and tenor, except as to dates of maturity, in a total amount of Eight Million Dollars (\$8,000,000), numbered 1 to 8,000, both inclusive, issued for the purpose of providing funds to acquire and take over property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest, including moneys required to be paid for redemption or extinguishment of its capital stock and/or for payment of certain of its obligations and for necessary expenses incurred in connection therewith, including expenses of the City incident to obtaining such funds, as well as for the purpose of making necessary betterments, improvements, extensions and additions to such property, pursuant to a resolution adopted by the Board of Direc-

tors for Utilities of the City of Indianapolis, Indiana, on the 7th day of May, 1935, entitled "A Resolution (No. 2—1935) for the Issuance of Gas Plant Revenue Bonds", and in compliance with all applicable provisions of law, including the provisions of Chapter 78 of the Acts of 1929, and Chapter 77 of the Acts of 1929, Chapter 67 of the Acts of 1931, and Chapter 125 of the Acts of 1933, as amended by Chapter 311 of the Acts of 1935, of the General Assembly of the State of Indiana; the proceeds of said bonds to be applied solely to the purposes hereinabove described and as stated in said resolution.

The principal and interest of this bond and all other bonds of said issue are equally and ratably secured by and constitute a charge upon all the income and revenues derived from the operation of all of the gas utility system now or hereafter owned and/or operated by the City of Indianapolis, an amount of which income and revenues sufficient to pay the principal and interest of this bond and all other bonds of said issue as the same fall due is hereby irrevocably pledged to such purpose; and the City covenants to fix, maintain and collect reasonable and just charges for all gas service, and faithfully to comply with all pertinent provisions of law, including the requirement of Chapter 190 of the Acts of 1933 of the General Assembly of the State of Indiana, viz: that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, interest upon bonds, provide a sinking fund for liquidation of bonds, maintenance costs, operating charges, adequate funds for working capital, repairs and upkeep, which requirement as written in said Act is hereby independently adopted and made a part of this bond. This bond and all other bonds of said issue shall be paid solely and exclusively from the income and revenues of such gas utility property and not otherwise, and shall not in any respect be a corporate indebtedness of such City nor of the Utility District of the City of Indianapolis as a special taxing district payable out of taxes.

The City covenants that it will cause to be deposited with a national bank in Indianapolis, Indiana (reserving the right to transfer such account or any part thereof to any other one or more responsible banks or trust companies) in a special account, under such conditions as that a trust therein shall be created for the purpose of payment of the interest on and principal of this bond and

all other bonds of said issue and that moneys can not be withdrawn from such account or accounts except for such purpose, on the 15th day of each month, so long as any of said bonds remain outstanding and unpaid, out of the revenues derived from the operation of said gas utility system, a sum equal to one-twelfth of the amount due and payable for principal during said year plus a sum equal to one-sixth of the amount due and payable for interest on the next succeeding interest payment date of said bonds.

This bond and all other bonds of said issue shall have the qualities of negotiable instruments in the hands of good faith holders, and shall be exempt from taxation as to principal and income as prescribed by the statutes of the State of Indiana.

This bond may be registered as to principal in the name of the holder, but unless so registered shall pass by delivery. The interest coupons annexed hereto shall at all times pass by delivery.

It is hereby certified and recited that all acts, conditions and things required to be done or performed precedent to and in the execution, issuance and delivery of this bond have been done and performed in regular and due form as provided by law.

In Witness Whereof, the City of Indianapolis, in Marion County, Indiana, has caused this bond to be signed in its corporate name by its Mayor and attested by its City Controller and its corporate seal to be hereunto affixed and attested by its City Clerk, and the interest coupons here-to attached to be executed with the facsimile signatures of said Mayor and City Controller, as of the first day of June, 1935.

City of Indianapolis,

By \_\_\_\_\_

*Mayor.*

Attest:

\_\_\_\_\_  
*City Controller,*

(Seal)

\_\_\_\_\_  
*City Clerk.*

• • • • •



Certificate of Execution of Bonds  
and Non-Litigation.

We, the undersigned, being the officers of the City of Indianapolis, Indiana, who are duly authorized by law and by resolution of the Board of Directors for Utilities of said City to sign and execute the bonds herein referred to, do hereby certify that we did on the 24 day of June, 1935, officially sign and execute each of the City of Indianapolis Gas Plant Revenue Bonds, numbered from 1 to 8,000 both inclusive, dated June 1, 1935, bearing interest at  $4\frac{1}{2}\%$  per annum, denomination of One Thousand Dollars (\$1,000) each, payable serially from June 1, 1938 to June 1, 1967, inclusive, as provided in Resolution No. 2—1935 adopted by said Board of Directors for Utilities on the 7th day of May, 1935; and that the facsimile signatures of the Mayor and of the Controller of said City are imprinted upon the coupons of said bonds, and that the corporate seal of said City has been impressed upon all of said bonds.

We further certify that no litigation of any kind is now pending or threatened in either state or federal courts seeking to restrain or enjoin, or in any manner questioning the authority or proceedings for, the issuance, sale, execution and delivery of the aforesaid bonds, or in any manner questioning the validity thereof, or the right, authority or power of said City of Indianapolis to acquire, own, and operate or lease to others to operate, the gas plant and property of the Citizens Gas Company of Indianapolis referred to in the above mentioned Resolution and in said bonds; that neither the corporate existence of said City nor the title of its present officers to their respective offices is being contested, and that no proceeding or authority for the issuance, sale, execution and delivery of said bonds has been rescinded, revoked or repealed.

Witness our respective hands this 27 day of June, 1935.

Oliver Kern,

*Mayor.*

Davin J. O'Neil,

*Clerk.*

Walter C. Bortiter,

*Controller.*

. . . . .

“(Only those parts of the transcript which are material to the present appeal have been printed.)”

(Inserted pursuant to stipulation filed November 22, 1939.)

1419

**CITY'S EXHIBIT 12.**

Minutes of Meeting of the Board of Directors for Utilities of the City of Indianapolis Held September 9, 1935. (Pages 178 to 236, inclusive, of Minute Book.)

A meeting of the Board of Directors for Utilities of the City of Indianapolis, Indiana, was held on Monday, September 9, 1935, at 1:30 P. M., at 1350 Consolidated Building, Indianapolis, Indiana, pursuant to call.

Present: Messrs. Dithmer, Elsey, Junglaus, Sahm and Angus. Messrs. Mooney, Hitz and Glossbrenner of the Board of Trustees also attended. Mayor Kern was present, and, by invitation of the Boards, ex-Mayor Sullivan was present.

President Dithmer announced that this was the time and place fixed for the receipt from Citizens Gas Company of Indianapolis of instruments evidencing the transfer of its property to the City of Indianapolis pursuant to the terms of the public charitable trust established with respect to such property.

On behalf of the Citizens Gas Company of Indianapolis, Mr. Frederick G. Rastenburg, its Secretary, and Mr. William G. Sparks, of counsel for the Company, appeared before the Board and presented to the Board certified copies of resolutions adopted earlier in the day by the Board of Directors of the Citizens Gas Company of Indianapolis and by its Trustees, which copies of resolutions, with the form of indemnity agreement therein referred to, are as follows, and are hereby spread of record in the minutes of this meeting:

(Here follows (pp. 179-181) a certified copy of a resolution of the Board of Trustees of Citizens Gas Company adopted on September 9, 1935, a copy of which resolution is in evidence as Plaintiffs' Stipulation Exhibit 87.)

1420-1422        •        •        •        •

(Inserted pursuant to stipulation filed November 22, 1939.)

"(Here follows a certified copy of a resolution of the Board of Directors of the Citizens Gas Company as to the irrevocability of certain trust deposits for the payment of the preferred and common stock of said Company)".

(Inserted pursuant to stipulation filed November 22, 1939.)

1423 (Here follows (pp. 185-7) a certified copy of a resolution of the Board of Directors of Citizens Gas Company adopted on September 9, 1935, a copy of which resolution is in evidence as Plaintiffs' Stipulation Exhibit 86.) (Inserted pursuant to stipulation filed November 22, 1939.)

(Here follows (pp. 188-9) a form of indemnity agreement which is identical with the form of indemnity agreement actually executed, a copy of which appears as Exhibit J to the second amendment and supplement to plaintiff's bill of complaint.)

1424 Upon motion duly made, seconded, and unanimously adopted it was:

Resolved, That the Board of Directors for Utilities of the City of Indianapolis execute to Citizens Gas Company of Indianapolis, as one step in the transfer to the City of Indianapolis of the property of said Company, and in consideration of such transfer, an Indemnity Agreement substantially in the form specified in the foregoing resolution adopted by the Board of Directors of said Company and by its Trustees; and

Be It Further Resolved, That Henry L. Dithmer be and he is hereby authorized and directed to sign and deliver a copy of such indemnity agreement for and on behalf of this Board.

President Dithmer thereupon signed and delivered to the said Secretary of the Citizens Gas Company of Indianapolis a copy of said indemnity agreement; a duplicate original of which is as follows:

(Here follows (pp. 191-2) an executed copy of the Indemnity Agreement, a copy of which appears as Exhibit J to the second amendment and supplement to plaintiff's bill of complaint.)

(Inserted pursuant to stipulation filed November 22, 1939.)

1425 Thereupon said Frederic G. Rastenburg as Secretary of said Citizens Gas Company of Indianapolis and on its behalf tendered to Henry L. Dithmer as President of the Board of Directors for Utilities of the City of Indianapolis on behalf of the City of Indianapolis instruments of transfer of property of said Company as follows, viz:

- (1) Deed of Conveyance of Real Estate;
- (2) Assignment of Personal Property;
- (3) Assignment of Majestic Building Lease;

(4) Assignment of Indianapolis Gas Company lease; copies of which documents are here spread of record:

(Here follow copies of:

I. "Deed of Conveyance of Real Estate" (pp. 194-7), a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 55.

II. "Instrument of Transfer and Assignment of Personal Property" (pp. 198-204), a copy of which appears as Exhibit E to the bill of complaint (I. R. 122-127.)

III. "Assignment of Lease" (pp. 205-8), a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 56.

IV. "Assignment of Lease" (pp. 209-212), assigning the lease dated September 30, 1913 from The Indianapolis Gas Company to the Citizens Gas Company, a copy of which appears as Exhibit F to the bill of complaint (I. R. 127-129).

(Inserted pursuant to stipulation filed November 22, 1939.)

1426 The Secretary of said Citizens Gas Company and its said counsel having retired from the meeting, the Board then deliberated upon the said tender of such instruments of transfer.

Mention being made that Messrs. Dithmer and Elsey, with counsel, had conferred with officials of The Indianapolis Gas Company upon several occasions, and that subsequently an inquiry was addressed to such officials on behalf of this Board to which no answer had been received though answer was requested before this date, such inquiry being as follows:

(Here follows (p. 214) a copy of a letter, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 59.)

(Inserted pursuant to stipulation filed November 22, 1939.)

1427 And discussion following with respect to the rights of the City to condemn and purchase the property of The Indianapolis Gas Company; to building a system substantially duplicating its property to the extent necessary to render service to consumers; and to leasing its property; as well as with respect to the provisions of the lease, assignment of which was tendered, in relation to the rights and duties of the City and of this Board on behalf of the City, and its probable effect upon the operations of the gas system, a resolution was offered

by Mr. Junglaus, seconded by Mr. Angus, and unanimously adopted, as the President so announced, as follows:

(Here follows (pp. 216-18, part of 219) "Resolution for Rejection of Assignment of Lease", a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I. R. 202-204)). (Inserted pursuant to stipulation filed November 22, 1939.)

1428 (Conclusion of p. 219.)

President Dithmer thereupon executed a copy of such "Rejection of Assignment of Lease and Refusal to Assume, Take Over, Or Be Bound Thereby", which was attested by Secretary Sahm and duly acknowledged, and delivered the same to the said representatives of the Citizens Gas Company of Indianapolis. Another copy was likewise executed and directed to be recorded in the office of the Recorder of Marion County, Indiana. A duplicate original is here spread of record, as follows:

1429 (Here follows (p. 220) an executed copy of a document entitled "Rejection of Assignment of Lease and Refusal to Assume, Take Over, or Be Bound Thereby", a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I. R. 203-4)).

(Inserted pursuant to stipulation filed November 22, 1939.)

1430 With respect to the tendered assignment of the lease between the Receiver of the Majestic Building Company and said Citizens Gas Company of Indianapolis, the Board was made acquainted with the fact that while the present Receiver had been informed of the Board's desire to negotiate a new lease, no negotiations were in progress, and negotiations could not have been consummated prior to September 9, 1935. Thereupon it was duly:

"Resolved, That this Board accept the tendered assignment of the certain lease between the Receiver of Majestic Building Company, an Indiana corporation, and Citizens Gas Company of Indianapolis, an Indiana corporation, on condition that the right of termination prior to the expiration date of such lease be preserved and available for exercise by the City".

—which resolution the President declared to be unanimously adopted.

The Board being informed that such lease had not been recorded in the office of the Recorder of Marion County, Indiana, counsel was directed to write said Receiver that such assignment had been conditionally accepted. Counsel subsequently reported that a letter had accordingly been written to L. Ert Slack as Receiver to such effect.

At this point the Board recessed to meet with representatives of the public press, and to permit recordation of the pertinent papers.

After recess, counsel reported that the said deed of conveyance of real estate had been recorded in the office of the Recorder of Marion County, Indiana, at 1431 3:45 P. M. on this September 9, 1935, in Deed Record 937 as Instrument No. 22602, the Auditor of Marion County having theretofore noted the transfer on his records pertaining to taxation; and that the said Assignment and Transfer of Personal Property had been recorded at the same time as Instrument No. 22603 in Miscellaneous Record 265 in said Office. Also that the tendered assignment of the said lease between The Indianapolis Gas Company and Citizens Gas Company of Indianapolis having been recorded at the instance of said latter company (being Instrument No. 22604 in Miscellaneous Record 265 in said office), counsel had caused an executed copy of said "Rejection of Lease" (hereinbefore authorized) to be placed of record in said office as Instrument No. 22605 in Miscellaneous Record 265.

Counsel also stated that at 4:05 P. M. on said day he served a certified copy of the resolution of this Board with respect to rejecting the tendered assignment of said The Indianapolis Gas Company lease, as well as an executed copy of said "Rejection of Lease" upon William J. Yule as Secretary of said The Indianapolis Gas Company at the office of said Company at Room 1004 Majestic Building in the City of Indianapolis, and left such copies with such Secretary.

It appearing that the City of Indianapolis was now the record owner of property formerly owned by said Citizens Gas Company of Indianapolis, and that the City was prepared to operate such property, consideration was given to the continuati of service to consumers of gas formerly served by aid of property belonging to said The Indianapolis Gas Company.

Mr. Elsey thereupon moved and Mr. Sahm seconded, the adoption of the following resolution:

1432 (Here follows (pp. 223-5) "Resolution for Temporary Use of Property of The Indianapolis Gas Company", a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I. R. 200-202))

(Inserted pursuant to stipulation filed November 22, 1939.)

1433 Said resolution was duly adopted by the unanimous vote of the Board, and the President so announced.

A copy of said resolution was thereupon duly certified by the Secretary of the Board, and transmitted to the Secretary of said The Indianapolis Gas Company forthwith, at its office in the Majestic Building in the City of Indianapolis, Indiana.

• • • • •  
“(Here appear several miscellaneous resolutions relating to the affairs of the Department of Utilities of the City of Indianapolis, none of which resolutions is material to this appeal.)”

(Inserted pursuant to stipulation filed November 22, 1939.)

1434-1442 • • • • •

1443 There being no further business the meeting adjourned.

(Signed) Henry L. Dithmer,  
*President.*

Attest:

(Signed) Roy Sahm,  
*Secretary.*



1443

CITY'S EXHIBIT 13.

Letter Head of  
Smith, Remster, Hornbrook & Smith

September 10, 1935.

Messrs. Thompson, Rabb & Stevenson,  
Consolidated Building,  
Indianapolis.  
Attention of Mr. Rabb.

Gentlemen:

This will acknowledge the delivery of the following papers which bear the following titles:

1. Resolution for rejection of assignment of lease between The Indianapolis Gas Co. and Citizens Gas Company of Indianapolis.

2. Rejection of assignment of lease and refusal to assume, take over, or be bound thereby.

It is, of course, understood that this letter merely acknowledges the physical delivery of such papers, as we have not been authorized by the Citizens Gas Company of Indianapolis to accept such papers or to take any action in regard thereto.

Very truly yours,  
Smith, Remster, Hornbrook & Smith.

WGS;FF

1443B-1464      •      •      •      •      •

1465

CITY'S EXHIBIT 28-A.

January 4, 1937.

Halsey Stuart & Co., Inc.,  
201 S. LaSalle Street,  
Chicago, Illinois.

Gentlemen:

We have a copy of the proposed revised circular pertaining to the City of Indiana  $4\frac{1}{2}\%$  Gas Plant Revenue Bonds.

The third paragraph of the proposed circular contains a reference to the Indianapolis Gas Company. The statement is made that the City has not "as yet" assumed or adopted the former lease. The quoted words give rise to an impli-

cation that the City may have under consideration the adoption of such lease. The implication would be incorrect inasmuch as the City has definitely and unqualifiedly rejected an assignment of such lease and is not negotiating for a new lease. The further statement is made that "lease rentals" have been paid. This is not correct. Sums have been paid by the City equivalent to figures specified in the lease but such payments have been accompanied by the definite caution to the Indianapolis Gas Company that the payments were not lease rentals and were not made in recognition of the lease. The property of the Indianapolis Gas Company is being operated by the City of Indianapolis under an interim agreement pending final determination of questions raised between the City and the Indianapolis Gas Company and the parties interested in the property of the Company. The further statement is then made that "while litigation has developed relative to the City's position with respect to this lease, it is in our opinion not of direct significance as regards these Gas Plant Revenue Bonds which are adequately secured as hereinafter set forth". We recognize that such a statement represents your own opinion. We should have thought that rather than say that such litigation is not of direct significance, you would have said that such litigation has not directly affected these revenue bonds.

The statements you make as to the appraisal of the Indianapolis Gas Company property are based upon in-

formation obtained, as we understand, by an engineer of your selection and the proposed statement that such appraisal has been made by "an independent engineer" perhaps negatives any implication that the engineer was selected by the City. But we should not want any misunderstanding about this or any possibility of a representation by the City that the Indianapolis Gas property is of the value indicated by such independent engineer.

The new water gas set mentioned in the proposed circular has now been completed and is in operation.

The statement that the "coal requirements of Citizens Gas Company" have been purchased principally from the "Milburn" etc. Company "the entire capital stock of which is owned by Citizens Gas Company" is incorrect in that the Citizens Gas Company no longer owns or operates the

Milburn Company; also, while large quantities of coal from the Milburn Company have been used by Citizens Gas & Coke Utility, the name used by the City of Indianapolis in operating its municipal gas system, substantial quantities of coal are bought elsewhere due to the requirements for blending purposes.

We appreciate that the draft of circular has been submitted to us merely as a matter of courtesy on your part. It is your wish that such draft be submitted to the members of the Board of Directors for Utilities?

Very truly,

1467

CITY'S EXHIBIT 29.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Consolidated Caption—1844 and 1950) • •

OBJECTIONS BY DEFENDANTS, CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARDS OF TRUSTEES AND DIRECTORS OF THE DEPARTMENT OF UTILITIES OF THE CITY OF INDIANAPOLIS TO CERTAIN SUBDIVISIONS OF THE STIPULATION IN THIS CAUSE AND TO CERTAIN EXHIBITS THERETO ATTACHED AND THEREIN IDENTIFIED.

Edward H. Knight,  
*Corporation Counsel of Indianapolis;*

Michael B. Reddington,  
*City Attorney of Indianapolis,*  
City Hall, Indianapolis,

William H. Thompson,

Albert L. Rabb,

Patrick J. Smith,

1350 Consolidated Building,  
Indianapolis,  
*Solicitors for Said Defendants.*

1468 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption.) • •

**OBJECTIONS BY DEFENDANTS, CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARDS OF TRUSTEES AND DIRECTORS OF THE DEPARTMENT OF UTILITIES OF THE CITY OF INDIANAPOLIS TO CERTAIN SUBDIVISIONS OF THE STIPULATION IN THIS CAUSE AND TO CERTAIN EXHIBITS THERETO ATTACHED AND THEREIN IDENTIFIED.**

The defendants, City of Indianapolis and the individual defendants who are members of the Boards of Trustees and Directors of the Department of Utilities of the City of Indianapolis hereby object to the introduction in evidence of each of the following parts and portions of the Stipulation signed by all the parties to this cause (the right to make such objection being reserved by the terms of such stipulation) and to certain exhibits thereto attached and referred to therein, upon the grounds stated as follows:

1. To subdivisions 7 (a), (b), (c), (d), (e), and (f) and each of them of said Stipulation and to each of the following exhibits referred to or described in said subdivisions of said Stipulation or attached thereto: Exhibit D to plaintiff's bill of complaint in Cause No. 1844, Exhibit E to plaintiffs' bill of complaint in Cause No. 1950, Exhibits 5, 6, 7, 8 and 9 to said Stipulation, for each of the following reasons:

First. Said Public Service Commission in considering the lease here in question acted only in a legislative and administrative capacity and not in a judicial capacity.

Second. The Public Service Commission acts for the people of Indiana and in considering this lease, could under the law, consider it only as it affected the rights of the citizens served by the utility companies and had no power or authority to determine the judicial question of the validity of such lease as between the parties.

Third. Inasmuch as the City was not a party to the lease, was not obligated to accept an assignment of it, did not accept an assignment of it, has not adopted it, 1469 has not recognized it as binding in any way, and has

rejected an assignment thereof evidence as to approval of the lease by the Commission is inadmissible.

2. To subdivisions 9 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) of said Stipulation and to each of the following exhibits referred to or described in said subdivisions of said Stipulation or attached thereto, viz.: Exhibits 13 and 14 to said Stipulation, Exhibit D to plaintiff's bill of complaint in Cause No. 1844, and Exhibit E in Cause No. 1950, and each of them, for each of the following reasons:

First. The City of Indianapolis was not a party to said judgment inasmuch as the plaintiff, Fishback, dismissed as to the City of Indianapolis as a party before any judgment was entered in said cause. Said judgment therefore cannot operate as an estoppel against these defendants.

Second. Under the statutes in effect at the time of the commencement of said action and continuously until the appeal of said Fishback was dismissed by the Supreme Court of Indiana no appeal could be taken from any order of the Public Service Commission of Indiana except from an order fixing rates or regulations, practices, acts or service, and said order of said Commission in approving said lease of September 30, 1913, was not appealable; that the action commenced and prosecuted by said Fishback in said Court of Marion County, Indiana, was not an appeal under a statute, but was a suit in equity to set aside and vacate in its entirety said order of the Public Service Commission of Indiana approving said lease of September 30, 1913; that the sole question which could lawfully be heard and determined by the court in such action was whether said order of the Public Service Commission was valid or invalid; that inasmuch as said Public Service Commission of Indiana could exercise no judicial power and had no authority to determine or adjudicate the validity of said lease, the Superior Court of Marion County, Indiana, in the case commenced and maintained by said Fishback could not adjudicate or determine the validity of said lease or its binding effect on the City of Indianapolis.

Third. The cause of action in the Fishback case and the cause of action in this case are essentially different in that in the Fishback case the sole question involved and which could have been litigated under the issues formed in that case was whether the administrative order of the Public Service Commission approving said lease was valid or invalid, whereas in this case the question involved is the binding effect of said lease on these defendants subsequent

to September 9, 1935, on which date the gas plant and property formerly operated by said Citizens Gas Company of Indianapolis as Trustee was transferred to the City of Indianapolis as Successor Trustee. Inasmuch as the causes of action are different, the Fishback decree cannot be res adjudicata of any questions except those actually litigated therein; and none of the questions involved in this case was or could properly have been litigated in the Fishback case.

Fourth. At the date of the rendition of the judgment of the Marion Superior Court in the Fishback case 1470 and at the time Fishback's appeal was dismissed by the Supreme Court of Indiana there was not in effect in the State of Indiana any declaratory judgment statute and the Superior Court of Marion County was without power to determine or try questions which had not then arisen but which might arise in the future, that is to say, the binding effect of said lease of September 30, 1913, against these defendants, subsequent to the date of the transfer of the trust property to the City of Indianapolis as Successor Trustee.

Fifth. That in the joint demurrer filed by the Public Service Commission of Indiana, The Indianapolis Gas Company and the Citizens Gas Company of Indianapolis to the sixth paragraph of Fishback's amended complaint there appears the following:

"The lease set out in the complaint itself provides that if for any reason the lease should be held to be for too long a term, it shall be valid such length of time as a lease could lawfully be made."

That said Fishback case was heard and determined on the theory that whether said lease of September 30th, 1913 was valid for its entire term or not, the action of the Public Service Commission of Indiana in approving the same could not be vacated or set aside.

Sixth. That the estoppel of the Fishback case can only extend to facts as they were in issue at the time the judgment was rendered and cannot prevent a re-examination of even the same questions between the same parties where, in the interval, the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties thereto; that since the judgment and decree in the Fishback case was entered and rendered facts have occurred which occurred which alter the rights and relations of the parties hereto, to wit: The transfer of the trust property to the City of Indianapolis as Successor Trustee on September 9, 1935, and the judgment and



decree rendered in the Fishback case is therefore not a determination of the rights of the parties thereto as of this date.

Seventh. That in said Fishback case both the City of Indianapolis and The Indianapolis Gas Company were defendants, but on the pleadings in that case no issue was raised, heard or determined as between said defendants involving the validity of said lease of September 30, 1913, or its enforceability against the City or its property, and the City of Indianapolis was not a party to the final judgment.

Eighth. That in said Fishback case all of the defendants thereto were sued in their individual capacities and not as Trustees; that no issue was heard, determined or decided by the court and none raised by any pleading filed in said cause involving the existence of said Public Charitable Trust or the effect of that legal status upon the validity of said lease of September 30, 1913, as against the City of Indianapolis as Successor Trustee or upon the beneficiaries of said trust.

Ninth. That the plaintiffs in these cases assert an independent and not a derivative right of action; that 1471 neither these plaintiffs nor any bondholder of The Indianapolis Gas Company were parties in the Fishback case; that no decree entered in said cause could bind these plaintiffs who were not parties thereto or be effective as an estoppel against the City of Indianapolis or the Board of Directors or Trustees of Utilities for the City of Indianapolis in respect of an independent cause of action which is in no sense derivative.

Tenth. That it is now claimed by the plaintiffs in these cases that the City of Indianapolis is bound to pay the rent reserved and all other obligations of the lessee under said lease of September 30, 1913, not merely out of the revenues arising from the operation of said leased property or of said trust property, but even out of revenues raised by taxation; that no issue was ever raised in said case in respect of the liability of the City of Indianapolis to meet the obligations of said lease out of revenues raised by taxation or otherwise and there can be no estoppel against the City of Indianapolis in connection with the present determination of such asserted liability.

Eleventh. Evidence as to approval of the lease or of its validity as such is inadmissible against the City in the absence of evidence that the City was a party to the lease,



or an assignee of it, or obligated to accept an assignment of it, or that the City adopted or recognized the lease as binding upon it.

3. To subdivisions 13 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k) of said Stipulation and each of them and to each of the following exhibits referred to or described in said subdivisions of said Stipulation or attached thereto, viz.: Exhibits 30, 31 and 32 to said Stipulation, for each of the following reasons:

First. Neither The Indianapolis Gas Company, these plaintiffs, any trustee of the Mortgage Deed of Trust of The Indianapolis Gas Company, nor any stockholder of The Indianapolis Gas Company were parties plaintiff, defendant, or intervenors in the Todd case and these plaintiffs were not represented in that litigation by anyone. Inasmuch as the decree in the Todd case could not have operated as an adjudication against these plaintiffs, that the lease of September 30, 1913 was unenforceable against the City of Indianapolis or its property, the decree in that case cannot operate as an estoppel against the City of Indianapolis. Unless there is a mutuality of estoppel no decree is *res adjudicata* in subsequent litigation as against any of the parties in the former suit.

Second. The cause of action in the Todd case and in this case are essentially different. The plaintiff in this case is attempting to assert an independent right to have a declaration of the validity of said lease of September 30, 1913, an issue which was not and could not have been determined in the Todd case.

Third. The causes of action not being the same in the two cases, there can be no estoppel by way of judgment except as to the issues actually adjudicated by this court in the Todd case. The court in the Todd case did not hear, determine, or decide any of the issues involved in 1472 this case and no issues involving such questions were even presented to the court for determination, no evidence was heard in respect of said questions, and no decision rendered thereon.

Fourth. The only way in which the question of whether a public charitable trust has been created in the property of the Citizens Gas Company arose in the Todd case was because the plaintiff in that case was asserting that the franchise contract of August 30th, 1905, violated the rule against perpetuities, and the court held that inasmuch as a public charitable trust had been created, title to the trust *res* had vested when said franchise contract was

executed and there was no violation of the rule. No issue involving the question of the validity of the lease of September 30, 1913, was tendered or decided in that case.

Fifth. The estoppel of a judgment extends only to the facts in question as they existed at the time the judgment was rendered and does not prevent an examination of the same questions even between the same parties, where by a later time the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. At the time of the entry of the decree in the Todd case there was no existing controversy between The Indianapolis Gas Company, its stockholders or bondholders on the one side and these defendants, or any of them, on the other, with respect to the validity of said lease. The Todd case was heard and finally determined on May 29, 1930. The facts and circumstances have altered and changed since the date of the decree in the Todd case by reason of the transfer of the trust property on September 9, 1935, to the City of Indianapolis as Successor Trustee and because of the fact that shortly before the time of such transfer and in, to wit: July, 1935, the first indication of a controversy arose as to the binding effect of said lease on the City of Indianapolis.

Sixth. There was not in force at the date of the entry of the final decree in the Todd case any Federal Declaratory Judgment Act which empowered the court to decide any question involving any difference between The Indianapolis Gas Company and the City of Indianapolis with respect to the rights of the parties under said lease of September 30, 1913, prior to a refusal upon the part of the City of Indianapolis to be bound by the terms of said lease; no such refusal had occurred and at the time of the Todd decree, the Citizens Gas Company of Indianapolis was regularly and promptly making, as and when due, the payments required by said lease, and had not asserted that it was not liable thereunder, or in any manner refused to comply with the terms of said lease.

Seventh. It is now claimed by the plaintiffs in these cases that the City of Indianapolis is bound to pay the rent reserved and to perform all other obligations of the lessee under the terms of said lease of September 30, 1913, not merely out of the revenues arising from the operations of said leased property or of said trust property, but also out of public revenues raised by taxation. No issue was raised in the Todd case in respect of the liability of the City of Indianapolis to meet the obliga-

tions of said lease out of revenue raised by taxation or otherwise and there can be no estoppel against the City of Indianapolis in connection with the present determination of such asserted liability.

Eighth. There has been no showing that the City was either a party to the lease, or was obligated to accept an assignment of it, or did accept an assignment of it, or adopted it, or recognized it as binding in any respect.

4. To subdivisions 14 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) and each of them and to each of the following exhibits referred to or described in said subdivisions of said Stipulation or attached thereto, viz.: Exhibits 35, 36, 37, 38, 39 and 40, to said Stipulation, for each of the following reasons:

First. The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. The Williams case was heard, tried and determined prior to September 9, 1935, and the facts and circumstances have been altered and changed since the date of said adjudication by reason of the transfer of the property of the trust on said last named date to the City of Indianapolis as Successor Trustee.

Second. The cause of action involved in the Williams case was different from that involved in these cases in that a taxpayer of the City of Indianapolis there attempted to procure a determination of the invalidity of said lease on the ground that the execution of the same violated the Constitution of the United States and of the State of Indiana and that the execution of the same had been obtained as the result of a conspiracy: that none of the questions involved in this cause was actually litigated or determined by the Court in said case. Inasmuch as the causes of action in the two cases are not the same it is only matters which were actually determined and litigated in the Williams case which could bind any of the parties thereto and the judgment in that case is therefore not *res adjudicata* on the questions here involved.

Third. That the cause of action attempted to be asserted in these cases is an independent one and is not in any sense derived from the rights of The Indianapolis

Gas Company. Inasmuch as this is not a derivative cause of action, it is an essentially different cause of action from that involved in the Williams case and, inasmuch as the validity of the lease of September 30, 1913, was not challenged on the grounds now asserted by these defendants, the decree in that case is not *res adjudicata* of any question here involved.

Fourth. In the Williams case said The Indianapolis Gas Company and the City of Indianapolis were co-defendants. The causes of action in the Williams case and in this case are different. No issue was presented for determination or was adjudicated in said Williams case as between the co-defendants thereto, and under such circumstances the estoppel of the Williams judgment 1474 is applicable only as between those who were adverse parties in that case.

Fifth. That it is now claimed by the plaintiff in this case that the City of Indianapolis is bound to pay the rent reserved and all other obligations of the lessee under said lease of September 30, 1913, not merely out of the revenues arising from the operation of said leased property or of said trust property, but also out of revenues raised by taxation; that no issue was ever raised in the Williams case in respect of the liability of the City of Indianapolis to meet the obligations of said lease out of revenues raised by taxation or otherwise and there can be no estoppel against the City of Indianapolis in connection with the present determination of such asserted liability.

Sixth. No evidence as to judicial recognition or approval of the validity of the lease as such is admissible against the City in the absence of a showing that the City was a party to the lease, or assignee, or obligated to accept an assignment thereof, or adopted it, or recognized its validity.

5. To subdivision 15 (c) and to Exhibit "B" attached to the answer and counterclaim of defendants, the City of Indianapolis, and its Trustees and Directors for Utilities for each of the following reasons:

First. A city cannot be estopped expressly. It follows it cannot be estopped impliedly or in a quasi manner. Furthermore such circular has no probative force since it would not tend to prove or disprove any of the issues in this cause.

Second. Such admission to be admissible must be an ad-

mission of fact. In the instant case to have probative value it would have to be one of law, namely that the lease was valid.

Third. Such admission must be sufficiently certain without the aid of a forced or strained construction to bear out the interpretations placed on it. In the instant case it is not possible even by the most tortured construction of the language of the circular to put any words in the mouth of the city respecting the validity of this lease.

Fifth. The admission must have been made by a person having knowledge. This prospectus at the bottom of the front page recites: "The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

July 1, 1935."

Sixth. Since the City of Indianapolis is the party against whom this prospectus is being offered in evidence, it must be shown that the statement was made, or the prospectus written, authorized or ratified by someone having the legal right and power to do so and that such statement was made or such prospectus written, authorized or ratified within the scope of such authority. No one in this case had that authority with the possible exception, (which is not conceded) of the Board of Directors for Utilities and unless it can be shown that they had such authority and did

in a proper legal manner either write, authorize or ratify the prospectus, it is not admissible in evidence.

Seventh. The entire prospectus is irrelevant and immaterial to the issues in this cause for the reason that there is nothing in such prospectus relating to any statement by the City of Indianapolis in respect to the validity of such lease. It is not shown who issued the prospectus since no signatures appear on it, nor is there any indication as to who the author or publisher is.

Eighth. As to the City of Indianapolis the prospectus is pure hearsay as is borne out by the many statements on its face.

Ninth. There can be no showing that plaintiffs relied on this prospectus for revenue bonds in their purchase of Indianapolis Gas Company bonds.

Tenth. There has been no showing that the lease is binding on or enforceable against the City; no showing that the City was a party to the lease, an assignee of the lease, or obligated to accept an assignment thereof or obligated by reason of recognition or adoption of the lease.

6. To subdivisions 21 (a) and (b) and to each of the following exhibits referred to or described in said subdivisions of said stipulation or attached thereto: Exhibits 86 and 87 to said stipulation and Exhibit J attached to the Second Amendment and Supplement to Plaintiff's Bill of Complaint in Cause No. 1844 and to the Amendment and Supplement to Plaintiff's Bill of Complaint in Cause No. 1950, for each of the following reasons:

First. The Indemnity Agreement executed by the Board of Directors for Utilities on September 9, 1935, only purports to indemnify the Citizens Gas Company in respect of actions brought "on account of the conveyance, transfer and assignment of any or all of the property of the Company to said City." As the City on the same day and as a part of the same transaction refused to accept an assignment of said lease of September 30, 1913, the Indemnity Agreement by its own terms does not apply and was not intended to apply to the Lease of September 30, 1913.

Second. A municipal corporation cannot be estopped by the conduct of any of its officers. There is no statutory authority for the execution of this agreement if it be construed as an approval of the lease of September 30, 1913 (which it is not), but if so construed the agreement would be void and unenforceable.

Third. If this agreement be construed as an approval, express or implied, of the lease of September 30, 1913, it is void and unenforceable because in violation of the express provisions of the Indiana Statutes, particularly Sections 48-1507 and 84-7302 Burns' Indiana Statutes Annotated 1933, which require that no such contract shall be made for a period of more than 25 years and that such a contract to be valid must be approved by the Board 1476 of Public Works and the Common Council of the City of Indianapolis. Any contract attempted to be made in violation of those statutes is void and cannot be ratified.

Edward H. Knight,  
*Corporation Counsel of Indianapolis;*  
Michael B. Reddington,  
*City Attorney of Indianapolis,*  
William H. Thompson,  
Albert L. Rabb,  
Patrick J. Smith,  
1350 Consolidated Building,  
Indianapolis,  
*Solicitors for Said Defendants.*

1477-1481     •     •     •     •     •

“(City’s Exhibit 30 is a typewritten statement offering various exhibits on behalf of plaintiff. Copies of this statement were furnished to the Court and counsel and the statement was read into the record just prior to the calling of the first witness, Franklin Vonnegut).”

(Inserted pursuant to stipulation filed November 22, 1939.)



335 And afterwards towit at the November Term of said Court, on the 7th day of April, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Entered  
Apr. 7,  
1939.

Come now the parties by their respective counsel and the Court now makes its rulings upon the admissibility of certain exhibits offered in evidence at the trial of this cause on March 2nd, 3rd and 4th, 1939, the Court having reserved its rulings as to the admissibility of said exhibits at the time of said trial.

The objections to Plaintiff's Exhibit 135 are sustained, to which ruling plaintiff at the time excepts.

All other exhibits and evidence offered by plaintiff to which objections are pending or as to which the Court made no specific ruling at the time of said trial, including all the parts of the Stipulation of the parties (Plaintiff's Exhibit 1) which were offered by the plaintiff, are admitted and any objections thereto are overruled, to which ruling defendant, City of Indianapolis, excepts. As to plaintiff's offer of Paragraph 4 of the Stipulation of Facts in the case of *Todd vs. Citizens Gas Company*, et al., appearing on pages 192 and 193 of Plaintiff's

Exhibit 2 for identification, said offer is considered as 336 an offer of the entire Stipulation and said entire

Stipulation, appearing on pages 186 to 248, both inclusive, of Plaintiff's Exhibit 2 for identification, is admitted as Plaintiff's Exhibit 139. As to Plaintiff's Exhibit 89, being part of Section 18 of the answer of the City of Indianapolis, et al., in the case of *Cotter, et al. vs. Citizens Gas Company, et al.* (case No. 1192 on the docket of this Court), the offer is considered as an offer of the entire answer of the City of Indianapolis, et al., and said entire answer is admitted as Plaintiff's Exhibit 89.

All of the exhibits offered by plaintiff (except Plaintiff's Exhibit 135 which has been excluded as hereinbefore indicated) are hereby admitted and read in evidence.

All exhibits offered by the City of Indianapolis to which objections by plaintiff are pending are admitted and such objections are overruled, to which ruling plaintiff at the time excepts.

The motions of defendant City of Indianapolis to suppress the deposition of Robert E. Simond, taken in Chicago, and the deposition of Chester M. Clark and Joseph Edwards Baker, taken in New York, are overruled, to

which ruling said defendant at the time excepts. All objections taken by any of the defendants to the evidence or exhibits offered by plaintiff from said depositions are overruled, to which ruling defendant, the City of Indianapolis, excepts; all objections taken by the plaintiff to any of the evidence or exhibits offered by the defendant City of Indianapolis from said depositions are overruled, to which ruling the plaintiff excepts; and all exhibits offered as part of any of said depositions are admitted and read in evidence, to which ruling the respective objecting parties at the time except.

337 The request of the City of Indianapolis for the production of certain correspondence passing between William R. Higgins, one of the attorneys for The Indianapolis Gas Company, and Baker, Hostetler, Sidlo & Patterson prior to May 14, 1936, is denied, and the claim of privilege asserted by The Indianapolis Gas Company in connection therewith is sustained, to which ruling defendant, the City of Indianapolis, at the time excepts.

338 (Further Entry for April 7, 1939.)

Parties file approval of exhibits, which is as follows:

Filed  
Apr. 7,  
1939. 339 IN THE DISTRICT COURT OF THE UNITED STATES.  
\* \* (Consolidated Caption--1844 and 1950) \* \*

### APPROVAL OF EXHIBITS.

We hereby agree that the attached papers may be marked as plaintiffs' exhibits 127 (3 pages), 128, 128-a, 128-b, 130, 131 and 132, and that photostatic copy of plaintiffs' exhibit 129 may be used in place of the original letter, and that the three letters with reference to the filing of briefs in the Circuit Court of Appeals which were heretofore produced after the trial may be marked as plaintiffs' exhibits 136, 137, and 138 and become part of the record in the above entitled causes, and be read in evidence. This stipulation is to supersede stipulation heretofore made on the same subject as it has now appeared that there were already exhibits bearing numbers 133, 134 and 135.

Dated April 6, 1939.

(Here follow the signatures of counsel.)

340 The following is the request of The Chase National Bank of the City of New York, Trustee, for findings of fact and conclusions of law, submitted May 4, 1939:

341 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1844) • •

Submitted  
May 4,  
1939.

REQUEST OF THE CHASE NATIONAL BANK OF  
THE CITY OF NEW YORK, TRUSTEE, FOR FIND-  
INGS OF FACT AND CONCLUSIONS OF LAW.

William L. Taylor,  
John Adams,  
Howard F. Burns,  
*Solicitors for Plaintiff.*

Baker, Hostetler & Patterson,  
Union Commerce Building,  
Cleveland, Ohio,

*Of Counsel.*

342 • • • • •

343 Now comes The Chase National Bank, Trustee,  
plaintiff in the above entitled cause, and respectfully  
submits and requests the adoption of the following pro-  
posed Findings of Fact and Conclusions of Law:

Proposed Findings of Fact.

(1) The Court hereby adopts the Stipulation of the parties offered in evidence as Plaintiffs' Exhibit 1 and each of the exhibits identified therein as part of these Findings of Fact, as though said Stipulation and each of the exhibits referred to therein were specifically set forth herein. Throughout these findings the parties and the documents will be described as they are described in said Stipulation. (PX 1.)

(2) Each of the exhibits from the record referred to in the following findings is incorporated herein and made a part hereof as if specifically set forth in these findings.

(3) There is complete diversity of citizenship in this cause between the plaintiff and all of the defendants. (Stip. 1, pp. 2-3.)

(4) This suit was brought at the request of holders and owners of \$415,000 principal amount of the Bonds. (PX 125, 126; Stip. 3(d) p. 6.)

---

Note: For the convenience of the Court and the parties all references herein to the pleadings are, as in the brief, to the pleadings in the Trustee's case.

(5) There is now and has been at all times since this cause was filed a real and actual controversy between plaintiff, on the one side, and the defendants, and each of them, on the other, as to:

(a) The validity and binding effect of the Lease for its full term of ninety-nine years on said defendants, and each of them, and upon the property transferred to the City by Citizens Gas.

(b) The rights of the plaintiff and the holders and owners of Indianapolis Gas Bonds (hereinafter called "Bondholders") and the obligations of said defendants, and each of them, under the Lease.

(c) Whether the Trustee of the Mortgage or the Bondholders or both are entitled to assert the rights under the Lease.

(6) The joint petition filed by Indianapolis Gas and Citizens Gas with the Public Service Commission on May 21, 1913, is correctly set forth on pages 3 and 4 of Plaintiffs' Exhibit 13 (the complaint in *Fishback vs. Public Service Commission of Indiana, et al.*).

(7) The intervening petition of Frank S. Fishback filed with the Public Service Commission opposing 344 the approval of the proposed Lease from Indianapolis

Gas to Citizens Gas is correctly set forth on pages 4 to 7 of Plaintiffs' Exhibit 13 (the complaint in *Fishback vs. Public Service Commission of Indiana, et al.*).

(8) Following the approval by the Public Service Commission of the proposed Lease from Indianapolis Gas to Citizens Gas, Frank S. Fishback filed a petition for rehearing before the Public Service Commission (Bill, par. 8, admitted by all defendants), a true copy of which appears on pages 8 and 9 of Plaintiffs' Exhibit 13 (the complaint in *Fishback vs. Public Service Commission of Indiana, et al.*).

(9) On November 28, 1913, the Public Service Commission of Indiana overruled Fishback's petition for rehearing. (Bill, par. 8, admitted by all defendants.)

(10) Citizens Gas took the Lease from Indianapolis Gas with the full consent and approval of the City of Indianapolis. (PX 89, p. 85.)

(11) In all of the proceedings before the Public Service Commission of Indiana, upon the joint petition of Citizens Gas and Indianapolis Gas, upon the intervening petition of the said Frank S. Fishback, and upon the petition for a rehearing filed by the said Frank S. Fishback, the defendant, the City of Indianapolis, was duly

served with notice to appear and through its duly appointed and authorized counsel did in fact appear and participate therein. No objection by petition to said Commission or otherwise was ever made by said City of Indianapolis either to the execution of said Lease or to the orders made by said Commission, and said City has never, by any proceeding, act or suit, sought in any court to have set aside or vacated the determinations or orders of said Public Service Commission of Indiana, or to enjoin the enforcement thereof, or to prevent in any way such orders or determinations from being effective. (Bill, par. 8, admitted by all defendants.)

(12) Immediately after November 28, 1913, Citizens Gas took possession and control of the gas plant and system and other property of Indianapolis Gas described in the Lease and operated said plant and system as a unified part of its own plant and system continuously thereafter until September 9, 1935. (Crosier, R. 56-9.)

(13) At the time of the making of the Lease on September 30, 1913, the system of Indianapolis Gas had 383.15 miles of mains and the system of Citizens Gas had 184.52 miles of mains, and on the same date Citizens Gas had 11,165 meters in use and Indianapolis Gas had 41,541 meters in use. (PX 93, pp. 1-2.) At the same time a new battery of 41 modern coke ovens was just being completed at the Langsdale Avenue Plant of Indianapolis Gas and was turned over to Citizens Gas with the other leased property. (PX 93, p. 1.)

(14) In his complaint filed November 28, 1913, and the amendments thereto in the case of Fishback *vs.* Public Service Commission of Indiana, et al., Fishback was asserting his rights as a stockholder of Citizens Gas, a resident freeholder of Indianapolis, and a beneficiary of the public charitable trust, against Indianapolis Gas, Citizens Gas as original trustee, and the City as successor trustee of said public charitable trust. (PX 13, p. 2; PX 14, p. 4; Stip. 9(a) pp. 14-15.)

(15) In said case of Fishback *vs.* Public Service Commission of Indiana, et al., said Fishback attacked the Lease on the following grounds, among others (Bill, par. 9, admitted by all defendants; PX 14, p. 4):

(a) That Citizens Gas had no power to make such a Lease.

345 (b) That the City of Indianapolis had not consented to such Lease.

(c) That the Lease was improvident and burdensome from the point of view of Citizens Gas.

(d) That the Lease constituted a lien and incumbrance upon the property and earnings of Citizens Gas and thus impaired the obligation of the contract between the company, its stockholders, and the City.

(e) That the trustees, directors, and officers of Citizens Gas were not authorized to enter into a Lease for ninety-nine years.

(f) That the Lease would prevent the carrying out of the contract between the City and Citizens Gas and would prevent the City from taking over the Citizens Gas plant.

(16) Both the City and Citizens Gas opposed each of the contentions thus advanced by Fishback. (Stip. 9(b) and (c), p. 15.)

(17) Each of the contentions thus advanced by Fishback was adjudicated against him and in favor of the validity of said Lease. (Stip. 9(e), (h), (i). pp. 16, 17.)

(18) During the pendency of said Fishback case the City of Indianapolis, through its Board of Public Works, required extensions to be made in the lines and mains of Indianapolis Gas, as provided in subsection 6 of Section 27½ of the Lease, which provision had been inserted in said Lease at the instance of the City. (Bill, par. 9, p. 10; admitted by all defendants.)

(19) The position taken by the City and Citizens Gas in said Fishback case was a practical, contemporaneous construction of the existing contract between them, to the effect that Citizens Gas had the right to take the Lease of the Indianapolis Gas property for ninety-nine years, and that such Lease thereupon became part of the public charitable trust.

(20) In connection with the sale of its Indianapolis Gas Bonds to Blodget & Company, brokers who dealt in said Bonds, Citizens Gas represented to Blodget & Company and through Blodget & Company to the purchasing public that:

(a) Citizens Gas had a ninety-nine year Lease on the property of Indianapolis Gas;

(b) Said Lease for ninety-nine years had been approved by the Public Service Commission of Indiana;

(c) Citizens Gas guaranteed payment of the interest and the refunding of principal at maturity of said Indianapolis Gas Bonds;

(d) Citizens Gas had a monopoly on the gas business of Indianapolis.



Such representations appear more fully in Plaintiffs' Exhibits 3, 4, 5, 7, 8, and 9 to the New York Deposition.

(21) During the period from 1915 to 1935, both inclusive, Citizens Gas, through publications in Poor's Manual of Public Utilities and Moody's Manual of Public Utilities, made the same representations as those contained in the preceding finding, as more fully shown by Plaintiffs' Exhibits 95A to 98A, inclusive, and 99 to 110, inclusive. (Hill, R. 164-5.) Poor's Manual of Public Utilities and Moody's Manual of Public Utilities are, and during said period from 1915 to 1935 were, standard works of reference customarily relied upon by brokers, bankers, and the investing public generally in acquiring information about securities. (Payne, R. 48-9; Jewett, R. 74-5.)

(22) On the basis of and relying upon the representations so made (see findings 20 and 21), Blodget & 346 Company purchased Indianapolis Gas Bonds from Citizens Gas and the investing public purchased said Bonds from Blodget & Company and generally upon the market, and holders of said Bonds continued to hold them.

(23) By reason of the wide circulation given to said representations (see Findings 20 and 21) over a long period of years, the City is charged with notice of such representations.

(23½) The representations made by Citizens Gas (see Findings 20 and 21) and the acquiescence therein by the City was a practical contemporaneous construction by Citizens Gas and the City of the existing contract between the parties, to the effect that Citizens Gas had the right to take and had taken the Lease of the Indianapolis Gas property for ninety-nine years, and that such Lease thereupon became part of the public charitable trust.

(24) During the period from 1913 to September 9, 1935, Citizens Gas, the City, and the residents and inhabitants of Indianapolis accepted and enjoyed the benefits resulting from the use of the Indianapolis Gas property under said ninety-nine year Lease and the protection thus given to the public charitable trust, and were relieved from the waste and expense of competition and duplication of facilities.

(25) By the resolution of its Board of Public Works, adopted March 20, 1929 (PX 22), the City indicated to Citizens Gas its acceptance of the outstanding offer from Citizens Gas to purchase all of the property of Citizens Gas, including the Lease from Indianapolis Gas, subject to all obligations of Citizens Gas.



(26) Chapter 78 of Indiana Acts of 1929 was prepared by the legal department and special counsel of the City of Indianapolis employed for the purpose of bringing about a transfer of the plant and property of Citizens Gas to the City. Said Chapter 78 was passed in the exact form in which it was prepared and submitted by said counsel for the City, without any change or amendment of any kind or character. (PX 31, p. 126 of PX 2.)

(27) Chapter 77 of Indiana Acts of 1929 was evidently, as its context discloses, prepared and passed for the purpose of authorizing the transfer of the plant and property of Citizens Gas, including the plant and property leased from Indianapolis Gas, to the City. (Stip. 23, p. 34.)

(28) In the cases of *Todd vs. Citizens Gas Co.*, and others, and *Cotter vs. Citizens Gas Co.*, and others, filed in this Court in 1929, both the City and Citizens Gas took the position by their pleadings filed therein that there was a valid existing ninety-nine year Lease from Indianapolis Gas to Citizens Gas and that such Lease had been made with the full consent and approval of the City. (PX 89, p. 85.)

(29) The position taken by the City and Citizens Gas in their pleadings in said *Todd* and *Cotter* cases was a practical contemporaneous construction of the existing contract between the parties and of the City's acceptance by its resolution of March 20, 1929 (PX 22), of the outstanding offer from Citizens Gas, to the effect that the City had agreed to take all of the Citizens Gas property, including the Indianapolis Gas Lease.

(30) In his complaint filed March 12, 1930, in the case of *Williams, et al. vs. Citizens Gas Co., et al.*, Williams sued on behalf of himself and all other inhabitants and taxpayers of Indianapolis as beneficiaries of the public charitable trust, was seeking to protect the rights of 347 the public charitable trust, and the City of Indianapolis was made a party defendant as the trustee of said public charitable trust. (PX 35; pp. 111, 113, 114, 221 of PX 3.)

(31) In his complaint filed March 12, 1930, Williams claimed (Bill, par. 14; PX 35, pp. 201, 214 of PX 3):

(a) That the Lease between Indianapolis Gas and Citizens Gas was invalid.

(b) That the action of the Public Service Commission approving the Lease was unlawful.

(c) That the Lease was improvident from the stand-

point of the lessee and was therefore burdensome upon the trust estate.

(d) That the Lease "was ultra vires said Citizens Gas Company."

(32) Citizens Gas and the City of Indianapolis defended said suit brought by Williams upon the following grounds, among others (PX 37, pp. 4 and 5; PX 135, pp. 10-13):

(a) That the decision of the Public Service Commission of Indiana approving said Lease was conclusive on the parties and could not be collaterally attacked.

(b) That after the lapse of seventeen years and the expenditure of many millions of dollars in reliance upon the validity of the Lease, all persons claiming through or under the lessee, including Williams, were precluded by laches from attacking the validity of the Lease for its full term of 99 years.

(33) In affirming the judgment of the Superior Court of Marion County in the Williams case, the Supreme Court of Indiana denied the contentions advanced by Williams (See Finding 31) and upheld the contentions advanced by Citizens Gas and the City (see Finding 32). (Stip. 14(i), p. 25; *Williams v. Citizens Gas Co., et al.*, 206 Ind. 448; 188 N. E. 212.)

(34) The position taken by the City and Citizens Gas in the Williams case was a practical construction by them of the existing contract between them and of the City's acceptance by the resolution of March 20, 1929 (PX 22) of the outstanding offer from Citizens Gas, to the effect that the Lease was part of the public charitable trust for its full term of ninety-nine years, and that the City had agreed to take over all of the Citizens Gas property, including the Lease from Indianapolis Gas.

(35) In connection with the public offering of its Revenue Bonds the City represented:

(a) That said bonds were to be issued to obtain funds to take over "property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest." (PX 47, p. 1.)

(b) That the City was about to take over "the property operated by Citizens Gas Company." (PX 47, p. 16.)

(c) That the payment of the bonds would be "secured by a charge upon all the revenue from the operation of all of the gas system owned and/or operated by the City of Indianapolis." (PX 47, p. 5.)

(d) That the City was about to secure a system which

had enjoyed the exclusive right to supply gas to the inhabitants of Indianapolis. (PX 110, Chi. Dep., pp. 4-5.)

(e) That the system which the City was about to secure from Citizens Gas included property leased from Indianapolis Gas for a term of ninety-nine years, under a lease in which the lessee was obligated to pay the interest on the outstanding Mortgage Bonds and on any refunding bonds.

(PX 110, Chi. Dep., pp. 4-5.)

348 (f) That the City would use all reasonable efforts to maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County. (PX 47, p. 16.)

(36) The necessary implication of the representations made by the City, in connection with the public offering of its Revenue Bonds (as set forth in Finding 35), was that the City was taking over all the property either owned or operated by Citizens Gas, including the property leased from Indianapolis Gas.

(37) The City authorized and approved the representations made in Plaintiff's Exhibits 102, 104 and 105 to the Chicago depositions, the Halsey-Stuart circular and newspaper advertisements, except those representations relating to the value of the Citizens Gas and Indianapolis Gas property. (PX 111-114, Chi. Dep.) Said newspaper advertisements were published in the papers and on the dates shown in Plaintiff's Exhibit 116, Chicago Deposition.

(38) Halsey, Stuart & Company, and Otis & Co. purchased the City's Revenue Bonds and said bonds were in turn purchased by the public in reliance upon the representations made by the City set forth in Finding 35 and the representations authorized by the City which appear in Plaintiffs' Exhibits 102, 104, 105.

(39) The representations authorized by and made by the City in connection with the sale of its Revenue Bonds were a practical construction by the City of its resolution of acceptance on March 20, 1929, and of its contract with Citizens Gas, to the effect that the City had agreed to take all of the Citizens Gas property, including the Indianapolis Gas Lease.

(40) During the months of July, August and September, 1935, the City caused various sums to be paid to the holders of the common stock, preferred stock and bonds of Citizens Gas, in satisfaction of their respective rights, and said payments were made by the City, and the entire assets of Citizens Gas were received by the City, with full knowledge:

(a) Of the ninety-nine year Lease between Indianap-

olis Gas and Citizens Gas, and of the obligations of Citizens Gas under said Lease.

(b) Of the fact that, after the transfer of its property to the City, Citizens Gas would have no assets remaining with which to meet its obligations.

(41) On September 9, 1935 the City, through its Board of Directors for Utilities, accepted delivery from Citizens Gas (Sparks, R. 447-450) of:

(a) A deed of conveyance of real estate. (PX 55.)

(b) An instrument of transfer and assignment of personal property. (Ex. E to Bill in Cause 1844.)

(c) An assignment of lease assigning a lease to part of the Majestic Building. (PX 56.)

(42) On September 9, 1935 the City, through its Board of Directors for Utilities, accepted delivery from Citizens Gas of an assignment of lease (Ex. F to Bill in Cause 1844) assigning to the City the Lease from Indianapolis Gas to Citizens Gas. (Sparks, R. 447-450.)

(43) On September 9, 1935 the City, acting through its Board of Directors for Utilities, caused three of the four instruments of conveyance received from Citizens Gas Company (to wit, Exs. E and F to the Bill in Cause 1844 and PX 55) to be filed for record with the Recorder of Marion County, Indiana. (R. 16-17.)

(44) On September 9, 1935 the City, through its Board of Directors for Utilities, took possession and control 349 of all property of Citizens Gas, including that under lease from Indianapolis Gas, and has operated said plant and system as one unified plant continuously from September 9, 1935 to the present time. (Crosier, R. 59.)

(45) Since taking possession of the property of Citizens Gas the City has negotiated with Indianapolis Gas for a revision or cancellation of the Lease. (PX 58, 66, 67, 75, 76.)

(46) By reason of the provisions of the Mortgage (Ex. A to Bill), including the after-acquired property clause therein, all rights of the lessor under the Lease (Ex. B to Bill) became and ever since have been a part of the property covered by the Mortgage.

(47) The provisions of said Lease requiring the lessee to pay the interest on the Bonds to the holders thereof were made for the benefit of the Bondholders.

(48) The provisions of said Lease requiring the lessee to perform all of the lessor's obligations under the Mortgage (except as to the payment of the principal amount

of the Bonds) were made for the benefit of the Trustee and the Bondholders for whom it is Trustee.

(49) When the City took possession of the property of Citizens Gas, including that leased from Indianapolis Gas, on September 9, 1935, it made no arrangement or agreement with either the Trustee under the Mortgage or the Bondholders allowing it to take such possession, except as assignee of and subject to the provisions of the Lease originally made to Citizens Gas. Since September 9, 1935, the City has made no such arrangement or agreement with either the Trustee or the Bondholders, and neither the Trustee nor the Bondholders have consented to, acquiesced in, or ratified any arrangement or agreement permitting the City to take possession of and use the property of Indianapolis Gas, except as assignee of and subject to the provisions of the Lease.

(50) The property of Indianapolis Gas leased to Citizens Gas has become so merged with the Citizens Gas property that it is no longer practicable or economical to separate those properties or to operate either of them as independent or competing properties. (Crosier, R. 57-9.)

(51) On or about October 1, 1935 the City, through its Board of Directors for Utilities, paid the sum of \$171,575, to be used in the payment of the coupons on Indianapolis Gas Bonds falling due October 1, 1935 and, on or about October 23, 1935, surrendered its 18 coupons maturing on October 1 1935, of the face value of \$450.00, to the Trustee for cancellation, without the payment of any consideration therefor. (Yule, R. 109-110; PX 131.)

(52) At the time of the payment of the interest on the Indianapolis Gas Bonds by the City, on or about October 1, 1935, neither the Trustee under the Mortgage nor the Bondholders had any notice that such money was paid under any arrangement other than the acceptance of the Lease by the City. (Yule, 126-7.)

(53) Neither the City nor Indianapolis Gas gave any notice to the Trustee or the Bondholders that the City was denying its liability under the Lease, until November 7, 1935 and neither the Trustee nor the Bondholders had any knowledge that the City was denying its liability under the Lease until some time after the transfer of the Citizens Gas property to the City on September 9, 1935. (PX 116; Yule, R. 106; Beards e, R. 181.)

(54) Neither the Trustee nor the Bondholders had any knowledge of the proposed execution of the agreement of

March 2, 1936 (Ex H to Bill in Cause 1844), or of the fact that said agreement had been executed, until sometime after March 2, 1936, and neither the Trustee nor the Bondholders have in any way agreed to, acquiesced in or ratified said agreement.

(55) The necessary result of the agreement of March 2, 1936 (Ex. H to Bill in Cause 1844) was to bring about a default in the payment of interest on the Bonds, to depreciate the value of the outstanding Bonds, and to place the income derived from the operation of the mortgaged property beyond the reach of the Bondholders, and the fact that these results would necessarily follow from the execution and carrying out of the agreement was known to the City and Indianapolis Gas when the agreement was made.

(56) During the period since September 9, 1935, the City has paid (Yule, R. 111-126):

(a) All the State, county and municipal taxes on the property covered by the Lease becoming due after September 9, 1935;

(b) All the insurance premiums for insurance on the property covered by the Lease;

(c) All installments of Federal income taxes of Indianapolis Gas falling due between September 9, 1935 and December 31, 1936, on account of sums paid by either Citizens Gas or the City to Indianapolis Gas during the years 1934 and 1935;

(d) All installments of Indiana gross income tax of Indianapolis Gas falling due after September 9, 1935, to and including the payment of said tax due on April 15, 1936.

(57) During the period from September 9, 1935 to the present time the City has paid out various amounts for the maintenance of the Indianapolis Gas property covered by the Lease (Hill R. 168-170), but the Court reserves for future determination the question whether the City has adequately maintained said property or paid such amounts for maintenance as it was obligated to pay.

(58) During the period from September 9, 1935 to December 31, 1938, the City made various extensions and additions to the Indianapolis Gas property covered by said Lease at an aggregate cost exceeding \$95,000. (Yule R. 129; PX 122.)

(59) Indianapolis Gas has no property of any sort except the following (Yule R. 107-109):

(a) \$120,000 principal amount of its Bonds, which are



pledged to secure a loan of \$28,700 at the Indiana National Bank;

(b) Office furniture and equipment with an aggregate worth of less than \$500;

(c) The property leased to Citizens Gas and now in the possession of the City;

(d) Any rights which Indianapolis Gas may have against either the City, or the property transferred to the City by Citizens Gas, or Citizens Gas, or any one or more of them.

(60) The only consideration which the City gave for the property of Citizens Gas, other than its assumption of the liabilities and obligations of Citizens Gas, was paid by it directly to the Citizens Gas stockholders and bondholders and therefore, at no time since the transfer of its property to the City on September 9, 1935, has Citizens Gas had any property of any kind or description except such rights as it may have against either the City, or the property which was transferred to the City, or both.

(61) Neither the Bondholders who requested the Trustee to bring this suit nor Indianapolis Gas, nor any other person, firm or corporation, agreed to indemnify  
351 the Trustee for its costs, attorneys' fees or expenses in bringing this suit.

(62) There has been no collusion between the Trustee and Indianapolis Gas in the bringing or prosecution of this suit.

### CONCLUSIONS OF LAW.

(1) This Court has jurisdiction of this cause on the ground of diversity of citizenship between the parties thereto.

(2) The plaintiff has no plain, complete, or adequate remedy at law and adequate relief can only be secured by the granting of equitable relief.

(3) This suit is brought by the Trustee pursuant to rights granted in the Mortgage and on behalf of the Bondholders.

(4) The Lease (Exhibit B) upon its approval by the Public Service Commission became and at all times thereafter was and still is a valid, binding, and effective Lease for the term of ninety-nine years between Indianapolis Gas and Citizens Gas.

(5) The finding and order of the Public Service Com-



mission of Indiana (Exhibit D to Bill in Cause 1844), approving the Lease from Indianapolis Gas to Citizens Gas, is a binding and conclusive determination upon all parties to this case and upon the public charitable trust that the Lease was fair and reasonable and in the public interest.

(6) By reason of the position taken by Citizens Gas and the City in approving the proposed Lease and their failure to object to or raise any question about the validity of said Lease or the order of the Public Service Commission approving the same, said Citizens Gas and the City are

(a) estopped from denying, and

(b) precluded by their own laches from denying that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(7) The adjudications of the Superior Court of Marion County in the case of *Fishback vs. Public Service Commission, et al.*, are binding in the present case upon all parties who were parties to said cause.

(8) By reason of the position taken by Citizens Gas and the City in the case of *Fishback vs. Public Service Commission of Indiana, et al.*, said Citizens Gas and City are:

(a) estopped from denying, and

(b) precluded by their own laches from denying that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(9) The action of the City of Indianapolis through its Board of Public Works in requiring extensions to be made in the lines and mains of Indianapolis Gas in accordance with the provisions of the Lease was a formal acceptance and recognition of said Lease.

(10) In view of the representations made by Citizens Gas in the sale of Indianapolis Gas Bonds both the City and Citizens Gas are:

(a) estopped from denying, and

352 (b) precluded by their own laches from denying that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the

City from Citizens Gas, for its full term of ninety-nine years.

(11) In view of the acceptance of the benefits of said ninety-nine year Lease by Citizens Gas, the City, and the inhabitants of Indianapolis for almost twenty-two years, Citizens Gas and the City are:

(a) estopped from denying, and

(b) precluded by their own laches from denying that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(12) The resolution of the Board of Public Works of the City adopted March 20, 1929 (PX 22), was in acceptance by the City of the outstanding offer from Citizens Gas to purchase all of the property of Citizens Gas, including the Lease from Indianapolis Gas, subject to all obligations of Citizens Gas.

(13) By reason of the position taken by the City and Citizens Gas in the cases of *Todd vs. Citizens Gas Co., et al.*, and *Cotter vs. Citizens Gas Co., et al.*, the City and Citizens Gas are:

(a) estopped from denying, and

(b) precluded by their own laches from denying that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(14) The judgment of the Superior Court of Marion County in *Williams vs. Citizens Gas Co., et al.*, is a binding and conclusive determination upon all parties to this case and upon the public charitable trust of the following matters:

(a) That Williams had the right to sue on behalf of the public charitable trust.

(b) That the Lease is a binding obligation of said public charitable trust for the full term of ninety-nine years.

(c) That the Lease is a binding obligation of Indianapolis Gas, Citizens Gas, and the City of Indianapolis as successor trustee for the full term of ninety-nine years.

(d) That the decision of the Public Service Commission approving said Lease is conclusive and cannot be collaterally attacked.

(e) That Williams and all other beneficiaries of said public charitable trust and the trustees of said trust are

precluded by laches from attacking the validity of said Lease or its binding effect upon the public charitable trust or upon Indianapolis Gas, Citizens Gas, or the City as successor trustee, for the full term of ninety-nine years.

(15) By reason of the position taken by the City and Citizens Gas in the case of *Williams vs. Citizens Gas Co., et al.*, the City and Citizens Gas are:

(a) estopped from denying, and

(b) precluded by their own laches from denying that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

353 (16) By reason of the representations made by the City in connection with the sale of its Revenue Bonds the City is:

(a) estopped from denying, and

(b) precluded by its own laches from denying that the Lease is a valid and binding obligation of the City as successor trustee of the public charitable trust and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(17) By the acceptance of the instruments of transfer and conveyance delivered to the City on September 9, 1935, which expressly recited that the conveyances were made subject to all legal obligations of Citizens Gas, the property so conveyed to the City has at all times remained subject to all obligations of Citizens Gas, including its obligations under the Indianapolis Gas Lease.

(18) By accepting and recording the Assignment of Lease (Ex. F in Cause 1844) and by taking possession of the property covered by the Lease so assigned, the City became obligated on all the covenants of said Lease, by privity of estate, and has remained and still is obligated on all the covenants of said Lease for its full term of 99 years.

(19) By reason of its taking possession of the Indianapolis Gas property and its continuous operation thereof since September 9, 1935, the City is:

(a) estopped from denying, and

(b) precluded by its own laches from denying that the Lease is a valid and binding obligation of the City as successor trustee of the public charitable trust

and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(20) By reason of its taking possession of the Indianapolis Gas property, operating the same and receiving the income therefrom, the City has become liable under the Lease and is obligated to carry out all the terms and conditions thereof for its full term of 99 years.

(21) By reason of the provisions of the Mortgage (Exhibit A to Bill), including the after-acquired property clause therein, all rights of the lessor under the Lease (Exhibit B to Bill) became and ever since have been a part of the property covered by the Mortgage.

(22) The provisions of said Lease requiring the lessee to pay the interest on the Bonds to the holders thereof were made for the benefit of the Bondholders, and upon the execution and delivery of said Lease, the Bondholders became vested with a distinct and independent right to require the lessee and its successors and assigns to perform the lessee's obligation to pay the interest on the Bonds.

(23) The provisions of said Lease requiring the lessee to perform all of the lessor's obligations under the Mortgage (except as to the payment of the principal amount of the Bonds) were made for the benefit of the Trustee and the Bondholders for whom it is trustee, and said **Trustee became vested** with a distinct and independent right to require the lessee and its successors and assigns to perform all of the lessee's obligations and engagements, in so far as the same affect the rights of the Bondholders.

(24) Under the Indemnity Agreement (Exhibit J to Bill) the liability of the City to indemnify Citizens Gas accrues as soon as any liability is adjudicated against Citizens Gas.

(25) Under the Indemnity Agreement (Exhibit J to Bill) either the Trustee or the Bondholders or both, 354 upon securing a judgment against Citizens Gas, are entitled to have a judgment for the same amount entered against the City.

(26) The Lease of September 30, 1913, between Indianapolis Gas and Citizens Gas and all obligations thereof are binding for the full term of ninety-nine years upon Indianapolis Gas, as lessor, Citizens Gas, as lessee, the City of Indianapolis, as successor trustee and assignee of the Lease, and upon the property conveyed to the City by Citizen Gas.

(27) Neither the Trustee nor the Bondholders in any way agreed to, acquiesced in, or ratified the agreement of March 2, 1936, between the City and Indianapolis Gas. Said agreement of March 2, 1936, does not in any way alter or impair the rights of the Trustee or the Bondholders and does not in any way affect the liabilities or obligations of either the City, Citizens Gas, or Indianapolis Gas to the Trustee or the Bondholders.

(28) The question whether the Lease either was at the time it was made or now is onerous or burdensome is wholly immaterial to the determination of any issue in this cause now on trial, and the City is not entitled to defend against any of the obligations of the Lease on the ground that said Lease either was or is burdensome. It is therefore unnecessary to try or determine the issue presented by the City on that subject.

(29) By reason of the fact that the City took over all the assets of Citizens Gas and that whatever consideration was paid was given by it directly to the stockholders and bondholders of Citizens Gas, leaving Citizens Gas with no assets out of which to satisfy its obligations, the City is obligated to pay all the liabilities of Citizens Gas.

(30) In succeeding Citizens Gas as trustee of the public charitable trust the City accepted the trust property subject to all outstanding legal obligations of Citizens Gas and as successor trustee became liable for all obligations of Citizens Gas.

(31) By reason of

(A) The position taken by Citizens Gas and the City in approving the proposed Lease and their failure to object to said Lease or the order of the Public Service Commission approving said Lease,

(B) The position taken by Citizens Gas and the City in the case of *Fishback vs. Public Service Commission of Indiana, et al.*;

(C) The representations made by Citizens Gas in the sale of Indianapolis Gas Bonds and the City's acquiescence therein;

(D) The acceptance of the benefits of the Lease by Citizens Gas, the City, and the inhabitants of Indianapolis for almost twenty-two years;

(E) The position taken by the City and Citizens Gas in the cases of *Todd vs. Citizens Gas Co., et al.*, and *Cotter vs. Citizens Gas Co., et al.*;

(F) The position taken by the City and Citizens Gas in the case of *Williams vs. Citizens Gas Co., et al.*;

(G) The representations made by the City in connection with the sale of its Revenue Bonds;

(H) The taking possession of the Indianapolis Gas property by the City and its continuous operation thereof since September 9, 1935;

355 the City and Citizens Gas are:

(a) estopped from denying, and

(b) precluded by their own laches from denying that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(32) The plaintiff is entitled to judgment for the unpaid interest on the Bonds of Indianapolis Gas against

(a) Indianapolis Gas.

(b) Citizens Gas.

(c) The City.

(d) The property of the City transferred to it by Citizens Gas.

(33) The judgment to which plaintiff is entitled against said defendants and said property should include:

(a) The amount of all interest coupons falling due on and after October 1, 1936, to and including the date of judgment, being the sum of \$172,025 falling due semi-annually on October 1 and April 1 of each year.

(b) Interest on unpaid interest at the rate of 6% per annum from the date when the respective coupons fell due to the date of judgment.

(c) The costs, attorneys' fees and expenses of the prosecution of this suit, the amount of such costs and expenses to be reserved for later determination after the conclusion of this litigation.

(34) The defendants herein and the property of the City transferred to it by Citizens Gas should be held liable for said judgments for interest, interest on interest, and the costs and expenses of the prosecution of this suit, in the following order:

First: The City of Indianapolis, and the property received by said City from Citizens Gas.

Second: The Citizens Gas Company of Indianapolis.

Third: The Indianapolis Gas Company.

(35) By reason of the fact that all sums on deposit with the Indiana National Bank as escrow agent have



been derived from and are part of the proceeds of the City's operation of the property transferred, conveyed, and assigned to it by Citizens Gas and the property of Indianapolis Gas covered by the Lease (Stip. 20(a), p. 33), all of said funds in the hands of the Indiana National Bank are liable for and subject to the satisfaction of all obligations of Citizens Gas and of the property transferred to the City by Citizens Gas.

(36) The fund now on deposit with the Indiana National Bank under the agreement of March 2, 1936, may be used by the City to discharge its obligations to the plaintiff herein, but no part of said fund should be distributed either to Indianapolis Gas, Citizens Gas or the City until the determination of the issues presented in this cause which are reserved for later hearing.

Respectfully submitted,

William L. Taylor,  
John Adams,  
Howard F. Burns,  
*Solicitors for Plaintiff*  
*in Cause 1844.*

Baker, Hostetler & Patterson,  
Union Commerce Building,  
Cleveland, Ohio,  
*Of Counsel.*

Filed May 4, 1939.



1078 *Request of City of Indianapolis for Findings.*

356 The following is the request of the City of Indianapolis for findings of fact and conclusions of law submitted July 5, 1939:

Submitted  
July 5,  
1939.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1844) • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
SUBMITTED BY CITY OF INDIANAPOLIS.

Edward H. Knight  
*Corporation Counsel,*  
Michael B. Reddington,  
*City Attorney,*  
William H. Thompson,  
Albert L. Rabb,  
Patrick J. Smith,  
*Solicitors for City of Indianapolis and individual defendants who are members of the Board of Trustees and Directors of the Department of Utilities of said City.*

• • • • •  
The City of Indianapolis and the individual defendants who are members of the Boards of Trustees and directors of the Department of Utilities of the City of Indianapolis submit for the Court's consideration and hereby request the adoption of the following findings of fact and conclusions of law in the above case:

SUGGESTED FINDINGS OF FACT.

1. Plaintiff (hereafter referred to as "Chase") is a corporation established and existing under and by virtue of the banking laws of the United States with its principal place of business located in the City of New York in the State of New York and is engaged in and authorized to engage in a general banking and trust business. It is a resident and citizen of the State of New York.

2. Each of the defendants, The Indianapolis Gas Company (hereafter referred to as "Indianapolis Gas")

and Citizens Gas Company of Indianapolis (hereafter referred to as "Citizens Gas") is a corporation duly created and existing under the laws of the State of Indiana with its principal place of business in the City of Indianapolis, State of Indiana, and is a citizen and resident of the State of Indiana.

3. The City of Indianapolis (hereafter referred to as "City") is a municipal corporation existing under and by virtue of the laws of the State of Indiana and is located in the Southern United States Judicial District, Indianapolis Division.

4. Defendants, Thomas D. Sheerin, A. Dallas Hitz, Edward W. Harris and Charles Rauh are members of the Board of Trustees for Utilities of the City and each of them is a citizen and resident of the City and of the State of Indiana.

5. Defendants, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach and John E. Ohleyer are members of the Board of Directors for Utilities of the City and each of them is a citizen and resident of the City and of the State of Indiana.

6. The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum or value of \$3,000.

7. There are now issued and outstanding in the hands of the public, bonds of Indianapolis Gas secured by the mortgage hereafter described in the aggregate principal amount of \$6,881,000 (which includes \$120,000 and \$18,000 principal amounts, respectively, of such bonds held by Indianapolis Gas and the City). Each of said bonds and the coupons attached thereto are in the form set forth in the mortgage, a copy of which, marked Exhibit "A" is attached to the bill of complaint in this case and incorporated into these Findings by reference.

8. The Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company and Savings Bank of Baltimore are the owners and holders of the following amounts, respectively, of such Indianapolis Gas bonds, together with all interest coupons due on October 1, 1936, and thereafter attached thereto, viz.: \$265,000, \$150,000 and \$163,000.

9. Massachusetts Mutual Life Insurance Company purchased its bonds between March 13, 1925, and May, 1931; New England Mutual Life Insurance Company purchased its bonds between July 14, 1916, and August, 1931;

Savings Bank of Baltimore purchased its bonds during the years 1924, 1925, 1927 and 1928.

10. There is no evidence in this case that Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company, Savings Bank of Baltimore, or any other owner or holder of Indianapolis Gas bonds other than defendant City purchased any of their bonds at any time subsequent to August, 1931, except those purchased by Citizens Gas in 1932.

There is no evidence in this case that any present owner of Indianapolis Gas bonds purchased his or its bonds relying on any acts done or representations made by Citizens Gas or the City or any of their authorized officers or agents.

11. The last coupons attached to said Indianapolis Gas bonds which have been paid were those falling due April 1, 1936. When that interest was paid coupons were presented for payment by and payment was made to more than 940 individual and 210 corporate bondholders.

12. On October 1, 1902, Indianapolis Gas executed its mortgage deed of trust of which Chase is successor and sole trustee. A correct copy of said mortgage marked Exhibit A is attached to the bill of complaint in this cause and is by reference made a part of these findings. Said mortgage was given to secure the payment of principal and interest of bonds which were authorized to be issued in the total principal amount of \$7,500,000. Said mortgage was duly recorded.

13. The bonds issued under Indianapolis Gas mortgage were in the denomination of \$1,000 each payable on October 1, 1952.

The mortgage covers the entire operating property of Indianapolis Gas and contains provisions to secure the payment of such bonds and the ordinary covenants of a large corporate trust deed. The mortgage contains an after-acquired property clause and in addition to covering the physical property covers the rents, issues, income, tolls, and profits arising therefrom.

Subdivision 14 of the mortgage contains the following provisions:

\*   \*   \*   \*   \*

“(Here follows the 5th grammatical paragraph of Subdivision XIV of the Mortgage (Exhibit A to the bill of complaint, I. R. 46, lines 13-36)).”

(Inserted pursuant to stipulation filed Nov. 22, 1939.)

14. Citizens Gas was organized in 1906 under the general laws of Indiana providing for the incorporation of manufacturing and mining companies. Citizens Gas, although organized as a corporation for profit, was and always has been actually a quasi public corporation, its purposes and objects being fixed and controlled by a certain franchise and contract (granted and entered into on August 25, 1905, by and between the City and three individuals who were assignors of Citizens Gas) and other relevant trust instruments.

15. As a result of such franchise, contract and other relevant trust instruments a public charitable trust was created. The settlors, beneficiaries, trustees and trust res were as follows:

(a) The settlors were the public spirited citizens of Indianapolis who subscribed for stock of Citizens Gas;

(b) The beneficiaries of the trust were the then and future gas users of Indianapolis;

(c) The initial trustee was Citizens Gas with a definitely fixed and limited term of trusteeship, viz.: 25 years and as soon thereafter as the property of the trust could be conveyed to the successor trustee;

(d) The City was the successor trustee;

(e) The trust res was the property and plant of Citizens Gas, being the property formerly owned by the Consumers Gas Trust Company.

16. The franchise contract creating the public charitable trust referred to in the last preceding finding requires the individual grantees to organize an Indiana corporation to which the franchise should be assigned and whose Articles of Incorporation should provide as follows:

(a) The capital stock to be not less than \$1,000,000 to be divided into shares of \$25 each;

(b) No increase of the capital stock shall be made unless the new stock shall be sold at public auction;

(c) The Company shall make and publish a semi-annual public statement of its affairs and the City Controller shall have the right to examine its books and the City Engineer its plant and property;

(d) The entire capital stock shall be placed in the hands of five trustees, one of whom shall be nominated by the Mayor and the capital stock shall be voted as a unit in the selection of directors. Any vacancy occurring on the Board shall be filled by the remaining directors

1082 *Request of City of Indianapolis for Findings.*

except if a vacancy is created in the case of the member of the Board appointed by the Major it shall be filed by him;

(e) The voting trustees shall issue to each subscriber to the capital stock a beneficial certificate which shall entitle him to receive dividends at a rate not exceeding ten per cent per annum;

(f) The earnings of the Company shall be used in the following order:

First. To the payment of maturing debts and operating expenses;

Second. To the payment of dividends at the rate of ten per cent per annum; and

Third. In providing for extensions and betterments ordered by the Board of Public Works.

Fourth. The excess to the payment in whole or part of the amounts subscribed for stock.

(g) The franchise provides

• • • • •  
“(Here follows paragraph 1(g) of the Franchise Contract of August 25, 1905 (part of Exhibit C to the bill of complaint, I R. 84, lines 13-26)).”

(Inserted pursuant to Stipulation, filed Nov. 22, 1939.)

(h) The business and prudential affairs are to be managed by a Board of nine Directors elected annually.

(i) Subdivision 2 of the franchise reads as follows:

• • • • •  
“(Here follows paragraph 1(i) of the Franchise Contract (part of Exhibit C to the bill, I R. 84-85)).”

(Inserted pursuant to Stipulation, filed Nov. 22, 1939.)

(j) The company to be organized shall secure, acquire or construct and put in operation a fuel gas plant with not less than 100 miles of mains within eighteen months from the sale of the Consumers Gas Trust Company mains then pending and failing therein shall forfeit all rights hereunder, provided that the Board of Public Works may at any time after the sale of the Consumers Gas Trust Company mains require the individual grantees or their assigns to file a bond in the penalty of \$25,000 conditioned for the performance of the contract and the acquisition or construction of such fuel gas plant;

(k) The grantees and their assigns are to hold the city harmless from any damages occasioned by the construction of mains and there are elaborate provisions cov-

ering the doing of work in the streets, the supervision of that work, the construction of mains and the quality of gas to be furnished;

(l) The grantees agreed never to charge the consumer in excess of sixty cents per 1,000 cubic feet of gas and it is provided that if the price exceeds sixty cents the franchise becomes void and the city shall have the right to acquire said plant as upon the termination of the franchise period;

(m) There are also elaborate provisions for extensions of gas lines upon order of the Board of Public Works, the installation of meters, the testing of meters and the like;

(n) Subdivisions 21, 22, 23 and 24 of the franchise read as follows:

• • • • •  
“(Here follow subdivisions 21, 22, 23 and 24 of the Franchise Contract (part of Exhibit C to the bill, I R. 93-94)).”

(Inserted pursuant to Stipulation, filed Nov. 22, 1939.)

17. The Articles of Incorporation adopted by Citizens Gas contain the essential provisions required by the Franchise Contract. Subdivision 7 of such Articles reads as follows:

“Any member of the Board of Trustees may be removed by the Marion Circuit Court upon the showing that said trustee is an employee or holder of any of the securities or capital stock of or delivering gas to consumer residing in, or in the vicinity of the city of Indianapolis, or for any corrupt practice or any misconduct which said court may deem detrimental to the interests of said company. Removal from the city of Indianapolis shall, ipso facto, vacate the office of any trustee.”

18. There are no provisions in the franchise contract, the Articles of Incorporation of Citizens Gas or its by-laws authorizing the issuance of preferred stock or the execution of any mortgage, except that a mortgage shall be executed at the time of the transfer of the property to the City, if necessary, to pay the obligations and stock of Citizens Gas. There is no provision in any of the trust instruments authorizing Citizens Gas to become the Lessee of a competing gas property.

19. On September 30, 1913, Indianapolis Gas executed and delivered to Citizens Gas a certain written instrument of lease (hereafter called “Lease”). A correct copy of said



1084 *Request of City of Indianapolis for Findings.*

lease marked Exhibit "B" is attached to the bill of complaint in this case and is by reference made a part of these Findings. All the property leased by Indianapolis Gas to Citizens Gas was covered by and included in Indianapolis Gas mortgage. The trust res did not include any part of the property of Indianapolis Gas or any lease on any part of such property.

20. The lease contains the following provisions:

(a) The entire operating plant of Indianapolis Gas is leased to Citizens Gas for a period of 99 years from the 1st day of October, 1913.

Subdivision 32 of the lease contains the following provision affecting the term:

"In event it should be determined by a court of final jurisdiction that the contract is ultra vires or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract."

(b) Subdivision 1 of the lease reads, in part, as follows:

. . . . .

"(Here follows all of the first paragraph of subdivision 1 of the Lease except the last sentence thereof (Exhibit B to the bill of complaint, I R. 55-56))."

(Inserted pursuant to stipulation filed November 22, 1939.)

(c) The right is given to the Lessee to sell worn or damaged property and to procure a release of such property from the lien of Indianapolis Gas mortgage;

(d) The rent provided for in the lease is the payment of \$120,000 a year, which amounts to six per cent dividends on the outstanding stock of Citizens Gas and, in addition, five per cent interest on all outstanding bonds.

When the lease was executed there were outstanding \$4,833,000 of bonds and at the present time there are outstanding \$6,881,000.

It is further provided that when the maximum price of gas to general consumers shall be fixed at a sum more than forty-five and not more than fifty cents per 1,000 cubic feet the rent shall be increased \$10,000 a year and when such price of gas shall be fixed at a sum not more than forty-five cents the increased annual rental shall be \$15,000 instead of \$10,000.

(e) Provision is made for the issuance of additional



bonds to reimburse Lessee for expenditures made in betterments and extensions to the leased plant which can be drawn down by the Lessee to the extent of eighty-five (85%) per cent of sums so expended.

(f) The Lessee agrees to refund the mortgage debt during the entire period of the lease and if the bonds are sold at a discount to pay the Lessor the difference in cash and if sold at a premium to retain such premium.

(g) An inventory was made of the personal property and at the termination of the lease Lessee agrees to deliver to the Lessor usable merchandise of like value or to pay the Lessor in money the difference between the value of the property returned and the total value of the inventory.

(h) It is agreed that Lessee will do everything necessary to preserve its right to do business in the city. There then appears the following provision:

"That it will so far as the same may be necessary to that end, secure new franchises from time to time from the city of Indianapolis or other public authorities having power to grant said franchises to do business in the city of Indianapolis. That at or before the termination of the corporate life of the lessee, the lessee will so far as it is legally able so to do, either extend its corporate life or cause a new corporation to be formed to which it will transfer all its then property and assets and cause said new company expressly to assume all the obligations of this lease. And the like duty shall be assumed by all successive companies acquiring said property as such successors in title. All of which agreements however are expressly subject to the rights now held by the city of Indianapolis under the terms of the franchise granted to the lessee by said city."

(i) In addition to the agreed rental Lessee agrees to pay all taxes, general and special, ordinary and extraordinary, of every nature and description, not only upon the property but upon the rent reserved so far as such income constitutes the basis for an income tax.

(j) The provisions in respect of maintenance are as follows:

\* \* \* \* \*

"(Here follows the first grammatical paragraph of subdivision 15 of the Lease (Exhibit B to the bill, I R, 64))."  
(Inserted pursuant to stipulation filed November 22, 1939.)

(k) The right of the Lessor to surrender its existing franchise and accept an indeterminate permit is not to be abridged by the execution of the lease.

1086 *Request of City of Indianapolis for Findings.*

(l) Lessee also covenants to insure the leased property but may provide protection against loss by fire by the establishment of an insurance fund.

(m) Lessee agrees to operate the plant leased and to perform all grants to Lessor or contracts by it with the state or any municipal subdivision.

(n) Subdivision 22 of the lease reads as follows:

• • • • •  
“(Here follows subdivision 22 of the Lease (Exhibit B to the bill, I R. 72)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

(o) Upon the approval of the lease by the Public Service Commission, Indianapolis Gas shall file a declaration of a surrender of its franchise and state therein that it desires to receive in lieu thereof by operation of law an indeterminate permit.

(p) That in valuations for rate-making purposes only property actually used and useful shall be included in the rate base and unnecessary duplications of plant shall not be included.

(q) The power to regulate rates remains in the Public Service Commission and while this lease is in force Citizens Gas will permit regulation by the Commission.

(r) Lessee binds itself to extend the mains of the combined plants to the extent of at least three miles in any one year. In addition to these minimum requirements Lessee agrees to comply with any orders for extensions made by competent authority.

(s) A schedule of rates is set forth in the lease.

(t) There is a provision for arbitration of disputes.

21. On September 30, 1913, the property of Indianapolis Gas included a plant for making and distributing gas to consumers in the City, and about 375 miles of mains located in the streets and alleys of the City which mains were connected with meters of more than 41,000 customers who were served thereby.

22. The City is not named as a party obligated by the lease.

23. No ordinance or resolution was ever at any time adopted by the Common Council or the Board of Public Works of the City authorizing the execution of the lease or ratifying it, or agreeing to be bound by its terms.

24. No action has ever been taken at any time by the Boards of Trustees or Directors of the Department of Utilities of the City authorizing the acceptance of an as-

signment of said lease, ratifying the lease or agreeing to be bound by its terms.

25. The City took over the property of Citizens Gas on September 9, 1935, as successor trustee. More than a month prior to said date the City advised Citizens Gas that it would decline to accept an assignment of the lease and for that reason an assignment was made by Citizens Gas in a separate written instrument and was rejected by the City. The assignment made by Citizens Gas of the lease was physically delivered to the City and recorded and at the same time the City, through the Board of Directors for Utilities, adopted resolutions declining to accept an assignment of the lease, caused these resolutions to be recorded in the Recorder's Office of Marion County, Indiana, and a duly certified copy of them to be served on Citizens Gas and Indianapolis Gas.

26. Citizens Gas operated under the terms of said franchise contract and the amendments thereto from the date of the assignment thereof by the individuals to whom the franchise had originally been granted until August 27, 1921, at which time, pursuant to the terms of an Indiana statute authorizing it to do so, it filed with the Public Service Commission of Indiana its declaration of surrender of said franchise and accepted an indeterminate permit with the result that from August 27, 1921, until September 9, 1935, Citizens Gas operated as a public utility under an indeterminate permit. Said surrender and the acceptance of said indeterminate permit did not have the effect of modifying or rendering nugatory the terms of said franchise contract insofar as they created a public charitable trust and defined the terms and conditions thereof and the rights, duties and liabilities of Citizens Gas as original trustee, of the City as successor trustee and of the gas users of Indianapolis as the beneficiaries of said trust.

27. On September 9, 1935, Citizens Gas transferred its gas producing and distributing plant and system to the City and since that time City has operated said gas producing and distributing plant and system. Since September 9, 1935, Citizens Gas has not been engaged in any business of any nature whatsoever.

28. On or about May 21, 1913, Indianapolis Gas, Lessor, and Citizens Gas, Lessee, jointly submitted a tentative form of lease to the Public Service Commission of the State of Indiana and jointly petitioned said Commission to adopt and approve the terms and conditions set forth in said form of lease and to authorize them to enter into and ex-

ecute said lease. A correct copy of the finding and order of said Commission with respect to said lease is attached to the bill of complaint in this cause marked Exhibit D and is by reference made a part of these findings.

29. It appears in the finding and order of the Public Service Commission last referred to that Joseph B. Kealing, Corporation Counsel of the City, appeared for the City in said proceeding, but there is no evidence in this case that the Corporation Counsel for the City had any power or authority to bind the City in respect of said lease or the approval of the lease by said Commission.

30. Newton Todd, a beneficial certificate holder of Citizens Gas commenced an action in the United States District Court for the Southern District of Indiana on April 30, 1929. The only defendants in that case were Citizens Gas, the individuals who were voting trustees of its common stock, the City, the Mayor, Clerk and Members of the Board of Public Works of the City.

Neither Indianapolis Gas, Chase nor any predecessor trustee under Indianapolis Gas mortgage, nor any bondholder of Indianapolis Gas was a party plaintiff, a party defendant, or an intervenor in said cause.

No pleading was filed in the Todd case asserting either the validity or invalidity of the lease.

The issues tendered by the bill in the Todd case were:

(a) That the original agreement between the City and Citizens Gas contained in the franchise contract of 1905 was abrogated and annulled when Citizens Gas surrendered the franchise and accepted an indeterminate permit.

(b) That the surrender of the franchise and the acceptance of an indeterminate permit created a new contract between the State and Citizens Gas, one of the terms of which was that the City should have the right to acquire the property of Citizens Gas at a value to be determined by the Public Service Commission.

(c) That an Act of the Indiana General Assembly of 1929 purporting to legalize all of the provisions of the Articles of Incorporation of Citizens Gas and particularly those in respect of the mode of acquiring the plant and property of Citizens Gas by the City, resulted in an impairment of the obligations of the contract above referred to in violation of the Constitutions of Indiana and of the United States.

(d) That the franchise contract of 1905 merely gave an option to the City to purchase the property of the Citi-

zens Gas and this resulted in a violation of the rule against perpetuities.

The issues involved in the present case are wholly different from those involved in the Todd case. The question of the validity and enforceability against the City of the lease was neither involved nor determined in the Todd case and could not have been determined under the issues presented to this court in that case.

The Todd case was finally disposed of on May 18, 1931, when the Supreme Court of the United States denied Todd's application for a writ of certiorari and that no controversy had ever arisen or existed in connection with the validity or invalidity of the lease prior to July, 1935. Until the transfer of the trust res by Citizens Gas to the City, all payments provided for by the terms of said lease had been made as required therein and there had been no breach or threatened breach by Citizens Gas of its covenants under said lease.

31. Indianapolis Gas and Citizens Gas filed with the Public Service Commission of Indiana a joint petition asking for the approval of the lease. One Frank S. Fishback intervened, raised certain objections to the approval of the lease and after the Commission had entered an order approving the same filed a petition for a rehearing which was overruled.

Neither Chase nor any predecessor trustee of Indianapolis Gas, nor any bondholder of Indianapolis Gas, was a party to such proceedings.

When the Public Service Commission of Indiana approved the execution of the lease no claim had been asserted that the franchise contract of 1905 and other related papers resulted in the creation of a public charitable trust and at the time the Commission's approval was given to the lease it was 17 years before the date when a transfer of the trust property was required to be made to the City. Fishback did not intervene or resist the approval of the lease by the Public Service Commission as the beneficiary of a public charitable trust.

32. On November 28, 1913, Fishback commenced an action in the Superior Court of Marion County, Indiana, against the Public Service Commission of Indiana, Citizens Gas, Indianapolis Gas, and the City to vacate and set aside the order approving the execution of the lease.

Fishback sued as a stockholder of Citizens Gas and a resident freeholder of the City and not as a beneficiary of a public charitable trust.

1090 *Request of City of Indianapolis for Findings.*

Citizens Gas and the City were not made parties defendant as the initial and successor trustees of a public charitable trust. There was no averment in any of the ten paragraphs of complaint filed by Fishback that a public charitable trust had been created by the franchise contract of 1905.

Fishback sought to set aside the Commission's order on the following grounds:

(a) That the rentals fixed in the lease were excessive and that their payment by the Citizens Gas would result in a waste and misapplication of its funds and its inability to pay dividends due its stockholders.

(b) That the Citizens Gas was without power to enter into the lease without the consent of the owners of three-fourths ( $\frac{3}{4}$ ) in amount of its capital stock, which consents had not been obtained.

(c) That the City had not given its consent to such lease, had not joined in the execution thereof, and had granted to Citizens Gas no right to operate the property of Indianapolis Gas.

(d) That the findings and order of the Public Service Commission were not sustained by sufficient evidence and were contrary to law.

(e) That Citizens Gas had no power to enter into the agreement contained in the lease permitting the Public Service Commission to fix rates at which it should sell gas.

(f) That the obligation assumed by the Citizens Gas under the terms of said lease to pay interest on the bonds and dividends on the stock of Indianapolis Gas impaired the obligation of the contract existing between the Citizens Gas and plaintiff and other stockholders of that company in that it prevented Citizens Gas from executing a mortgage at the end of the franchise term in order to pay the stockholders of that company the par value of their stock and accumulated dividends thereon.

Prior to the entry of final judgment in the Fishback case, Fishback dismissed the City as a party defendant and the following order book entry was made in connection with such dismissal:

"Come now the parties and the plaintiff now dismisses the action, as against the defendant City of Indianapolis, upon which dismissal the court now enters judgment for costs against the plaintiff."

Fishback elected to stand upon his complaint and to abide the ruling of the court upon demurrers which had been



sustained to each paragraph of said complaint and judgment was rendered against him.

The City was not a party to the judgment rendered in the cause.

Neither Chase nor any other trustee under Indianapolis Gas mortgage nor any bondholder of Indianapolis Gas was a party plaintiff, defendant or intervenor in the Fishback case.

Fishback prayed an appeal from the decree of the Marion Superior Court to the Supreme Court of Indiana which dismissed the appeal because it was not perfected in time.

The first Indiana Declaratory Judgment Act became effective on May 16, 1927. At the date of the final disposition of the Fishback case there was neither an existing controversy nor the ripening seeds of such controversy between Indianapolis Gas, the trustees of its mortgage or its bondholders and the City as to the enforceability of the lease against the City or the trust property.

Up to the date when Fishback dismissed his cause against the City no issue had been presented between the City and Indianapolis Gas as to the validity of the lease.

There was neither in issue nor decided by the Court in the Fishback case any question as to the validity or enforceability against the City of the lease.

The Fishback case was tried and decided on the theory that whether the lease was valid for its entire term or not the action of the Public Service Commission of Indiana in approving the same could not be vacated or set aside.

Since the determination of the Fishback case new facts have occurred which alter the legal rights and relations of the parties thereto, viz.: the transfer of the trust res to the City as successor trustee on September 9, 1935.

After the City had been dismissed as a party defendant in said cause it was not again made a party thereto.

33. On May 12, 1930, Allen G. Williams as a resident and taxpayer of the City on behalf of himself and all others similarly situated commenced an action in which Citizens Gas, its voting trustees and directors, Indianapolis Gas, the then trustees under Indianapolis Gas mortgage, the Mayor, City Clerk, Board of Public Works, Boards of Trustees and Directors for the Department of Utilities of the City and the Public Service Commission of Indiana were defendants. A demurrer to plaintiffs' complaint was filed by the Public Service Commission, another by Indianapolis Gas and its mortgage trust-



tees and a third by the remaining defendants. The demurrers so filed were sustained, judgment was rendered against Williams and the case was appealed to the Supreme Court of Indiana and affirmed.

Neither a controversy nor the ripening seed of such a controversy existed at any time prior to the date of the final disposition of the Williams case between the City and Indianapolis Gas or its mortgage trustees or bondholders as to the enforceability against the City of the lease. The transfer of the trust res from Citizens Gas to the City as successor trustee was not made until long after the final disposition of the Williams case.

In the Williams case plaintiff attempted to procure a determination of the invalidity of the lease on the ground that execution of the lease violated the Constitutions of the United States and the State of Indiana and had been obtained as the result of conspiracy. None of the questions involved in this case were actually litigated in the Williams case nor could such questions have been litigated under the issues in that case.

No issue was made between Indianapolis Gas, its mortgage trustees or its bondholders and the City or the Boards of Trustees and Directors of the Department of Utilities in connection with the enforceability of said lease against the City, although the City had pointed out in a joint motion filed by it and Citizens Gas to strike out parts of plaintiffs' complaint that the validity of the public charitable trust was in nowise affected by the validity of such lease.

It was stated in said motion:

"If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust and is subject to be administered in the same way as the property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid it will fall outside the scope of the trust."

34. At the date of the execution and delivery of the lease \$4,833,000 total face amount of Indianapolis Gas Bonds were outstanding. Between June 22, 1914, and February 11, 1932, upon the request of Indianapolis Gas, the mortgage trustees authenticated and delivered to Indianapolis Gas additional bonds in the total principal amount of \$2,048,000. Pursuant to the provisions of the lease Indianapolis Gas, in turn, delivered \$1,971,000 principal amount of said additional bonds to Citizens Gas for the purpose of reimbursing Citizens Gas for eighty-five per

cent. (85%) of its capital expenditures on account of extensions and betterments to the plant and system of Indianapolis Gas made and paid for by Citizens Gas. As a result of such expenditures for extensions and betterments and the reimbursement by issuance of bonds, citizens Gas has expended for additions and betterments to the plant of Indianapolis Gas approximately \$200,000 for which it has received no reimbursement. All additions and betterments to the plant of Indianapolis Gas for which bonds were issued were made with its consent and under the terms of said lease said additions and betterments became and are the property of Indianapolis Gas. All of said bonds in the principal amount of \$1,971,000 were sold by Citizens Gas except bonds in the principal amount of \$18,000 which were retained by it. The proceeds of the bonds sold by Citizens Gas were received and used by it. It was many years after the execution of the lease before Chase received a copy of the same and in certifying such additional bonds as Chase certified, above referred to in this subdivision, Chase did not rely upon the validity or enforceability of said lease against the City and did not consider the lease as of any importance as security given to Chase under the terms of the mortgage.

There is no proof that any predecessor trustee of Chase which certified bonds either knew of the existence of the lease or relied upon it as a basis for a certification of any Indianapolis Gas bonds.

35. Citizens Gas operated the plant and property of Indianapolis Gas under said lease from November 28, 1913, until September 9, 1935. From October 2, 1913, until September 9, 1935, Citizens Gas from time to time duly paid the interest on the outstanding Indianapolis Gas bonds by making payment thereof to the holders of the bonds either at the office of the trustee or directly to such holders. During that period Citizens Gas paid all the rentals payable in cash under the terms of the lease and also paid all the taxes required to be paid by the Lessee under the terms of the lease; that the total payments so made by Citizens Gas are shown in Exhibit 20 attached to the Stipulation in this case, which exhibit, by reference, is made a part of and incorporated into these Findings.

That for the five (5) year period immediately preceding September 9, 1935, the aggregate payments made by Citizens Gas on account of the lease were approximately \$600,000 annually.

36. From the period of its organization in 1906 to June

30, 1935, Citizens Gas paid dividends to the holders of its common stock at the rate of ten per cent per annum. On September 9, 1935, when Citizens Gas conveyed, transferred and assigned its property to the City it turned over a sum of approximately \$411,000 in cash or current funds to the City.

37. On March 20, 1929, the City, through its Board of Public Works, adopted a resolution, a correct copy of which marked Exhibit 22 is attached to the Stipulation in this case and is by reference made a part of these findings. On April 3, 1929, the Directors of Citizens Gas unanimously adopted two resolutions, copies of which, marked Exhibits 23 and 24, are attached to the Stipulation in this case and by reference made a part of this finding. On April 3, 1929, the Board of Trustees of the Citizens Gas unanimously adopted a resolution approving the resolutions adopted by the Board of Directors of Citizens Gas. The resolutions referred to above in this subdivision of this stipulation contain demands by the City upon Citizens Gas that in accordance with the provisions of the franchise contract "the plants, property and assets of said Company be conveyed to said City of Indianapolis" and a recognition by Citizens Gas that it was obligated to make such conveyance.

38. In pursuance of a resolution adopted on May 7, 1935, by the Board of Directors for Utilities of the City, a public offering of \$8,000,000 of Indianapolis Gas Plant Revenue Bonds was made on May 28, 1935. A copy of said Resolution, adopted May 28, 1935, is identified as Exhibit 47 to the Stipulation in this case and is by reference incorporated into these findings. A correct copy of the notice by the City Controller of the City pursuant to said resolution marked Exhibit A is attached to the answer and counter-claim of the City in this case and is by reference made a part of this Finding. Resolutions similar to that of May 7th, 1935, were adopted by the Board of Directors for Utilities for the City on April 5th, April 10th and April 12th, 1935, and advertisements were published in pursuance of said resolutions on April 8th, April 12th, and April 18th, 1935, respectively. Said resolutions were substantially identical with Exhibit 47 to said Stipulation. Said advertisements were substantially identical with Exhibit A to the answer and counter-claim of the City. No bid resulting from said advertisements of April 8th, April 12th and April 18th, 1935, was acceptable to the City.

Later, viz. on May 29, 1935, a joint bid of Halsey Stuart

& Company, of Chicago, Illinois, and Otis & Co., of Cleveland, Ohio, for said revenue bonds was accepted by the City. The proceeds of the sale of said Revenue Bonds were received by the City June 27, 1935.

39. The purchasers of said revenue bonds issued an advertising circular, a correct copy of which marked Exhibit B is attached to the answer and counter-claim of the City and is by reference made a part of this finding.

Before the issuance of said advertising circular Halsey, Stuart & Company and Otis & Co., asked the City to approve the circular which was to be issued by them and were advised by the City and its representatives that the only authority which the City had in connection with the sale of revenue bonds was to make a public offering and that the City had no authority to approve or become responsible for any representations made in connection with the resale of said revenue bonds by the purchasers thereof.

That the circular and newspaper advertising issued by the purchasers of said revenue bonds were issued solely on their own authority and without authorization by the City and that there is no evidence to show that any persons who purchased said Gas Plant Revenue Bonds of the City did so on the faith of any representation made by the City or its authorized agents.

Any representations made by the purchasers of such bonds were never ratified or approved by the City or any of its authorized representatives.

40. The City caused the sum of \$2,500,000 to be paid on or about July 1, 1935, for the retirement of all of the Citizens Gas common stock. Said \$2,500,000 included \$2,000,000 as the par value of said common stock and \$500,000 as dividends thereon at the rate of ten per cent. per annum from January 1, 1933, to June 30, 1935. The City also caused the sum of \$1,050,000 to be paid on or about September 1, 1935, for the redemption of all of the Citizens Gas preferred stock in full satisfaction of the preferred stockholders' interest in the property and assets of Citizens Gas. Said \$1,050,000 included \$1,000,000 as the par value of said preferred stock and \$50,000 as the premium of five per cent. on the redemption thereof required by the terms of said preferred stock. Citizens Gas paid all the dividends on said preferred stock up to the time of said redemption. All of said common stock was retired and all of said preferred stock was redeemed.

41. On August 9, 1935, the Board of Directors for Utilities of the City adopted a resolution with respect to the

1096 *Request of City of Indianapolis for Findings.*

payment of the mortgage bonds of the Citizens Gas dated July 1, 1912, a copy of which resolution is attached to the Stipulation in this cause, marked Exhibit 48 and by reference made a part of this Finding. In pursuance of said resolution the City on August 10, 1935, published a notice, a copy of which, marked Exhibit 49, is attached to the Stipulation in this cause and in September, 1935, published a notice, a copy of which, marked Exhibit 50, is attached to the Stipulation in this cause, both of which exhibits marked 49 and 50 are by reference made a part of this Finding. The principal amount of Citizens Gas bonds outstanding on August 12, 1935, was \$2,745,000. All of said bonds have been paid and surrendered excepting bonds aggregating the principal amount of \$32,000.

Before payment of said bonds had been made by the City it was advised by its counsel that said Citizens Gas mortgage had been executed in violation of the terms of said public charitable trust, but that the moneys which Citizens Gas had received from the sale of the mortgage bonds had been used in additions to and betterments of the trust res and that the holders of the bonds had an equitable lien on the property for their debt; that it was in pursuance of this advice that the City paid said mortgage bonds.

That in the payment of the common and preferred stock of Citizens Gas and the dividends thereon and the premiums on the retirement of the preferred stock the City proceeded in accordance with the decree of this court and the Circuit Court of Appeals in the Todd and Cotter cases, above referred to, and that it was required to make said payments before taking over the res of the public charitable trust hereinbefore described and that in so doing it did not recognize directly or by implication the validity or enforceability against the City of the lease.

42. Prior to the transfer to the City of the plant and property of Citizens Gas on September 9, 1935, neither the City nor its Department of Utilities gave any notice to Chase or any formal notice to any holder of Indianapolis Gas bonds that said transfer and conveyance was to be made, but Indianapolis Gas was fully advised of said transfer and as early as July 23, 1935, was advised that the City would not accept an assignment of the lease; that wide publicity of the fact that said transfer was to be made appeared in the newspapers, including the publicity incident to the sale of the revenue bonds.

43. That in pursuance of agreements made between City and Indianapolis Gas, which agreements have been

continuously in effect since September 9, 1935, City has operated the gas producing and distributing plant and system of Indianapolis Gas. Such agreements provided in substance that such operation by the City should not prejudice the rights of either the City or Indianapolis Gas and further provided that the City by operating such plant did not recognize the validity of the lease and Indianapolis Gas by consenting to such operation did not admit that the lease was invalid.

That such agreements between City and Indianapolis Gas were made for the purpose of preventing the interruption of public service and in order that approximately 50,000 gas consumers on the mains of Indianapolis Gas should continue to receive a necessary public utility service.

That such operation by the City in pursuance of the terms of such agreements did not amount to an admission of the validity of the lease.

44. On March 2, 1936, the City and Indianapolis Gas entered into a written agreement, a correct copy of which is attached to the complaint in this case, marked Exhibit H and is by reference made a part of these Findings; that said agreement has never been modified or supplemented in any respect.

No settlement agreement as provided for in said contract of March 2, 1936, has ever been agreed upon between the City and Indianapolis Gas; that since the date of the execution of said agreement the City has made an effort to obtain a judicial determination of the validity of the lease and the non-enforceability against it of said lease as follows:

(a) On October 1, 1936, the City filed a counter-claim in this cause asserting the invalidity of said lease and asking a judicial determination of such invalidity.

(b) On October 28, 1938, the City filed a counter-claim in a suit brought by bondholders of Indianapolis Gas in this court in which it likewise asserted the invalidity of such lease and sought a judicial determination of such invalidity.

(c) On December 24, 1937, the City commenced an action to obtain a judicial determination of the invalidity of said lease, which cause is now pending as No. 13873 in the Circuit Court of Boone County, Indiana.

45. Indianapolis Gas did not pay any of the interest coupons due on October 1, 1936, April 1, 1937, October 1, 1937, April 1, 1938 and October 1, 1938, on any of the In-



dianapolis Gas bonds and all of said interest coupons remain unpaid.

46. The City, pursuant to the terms of the agreement of March 2, 1936, has from time to time made deposits with the escrow agent, The Indiana National Bank of Indianapolis, which deposits on December 31, 1938, aggregated the sum of \$1,217,875 which sum is now held by said Bank. Said Bank has never at any time paid out any of the sums so deposited with it. All of the sums so deposited with said Bank have been derived from and are part of the proceeds of the City's operation of the property transferred, conveyed and assigned to it by Citizens Gas and the property of Indianapolis Gas covered by the lease.

47. The City also has paid pursuant to the terms of the agreement of March 2, 1936, the sum of approximately \$171,000, being an amount equal to the interest due on Indianapolis Gas bonds on March 30, 1936.

48. That all payments made by the City of sums of money equal to the interest on the Indianapolis Gas bonds, dividends payable under the terms of the lease of September 30, 1913, or any of the moneys now in escrow at The Indiana National Bank of Indianapolis, would not have been made in the absence of the agreement of March 2, 1936, for the temporary use of the property of Indianapolis Gas, and certain correspondence exchanged between Indianapolis Gas and attorneys for the City in connection with the payments so made, in which contract of March 2, 1936, and correspondence it was agreed that neither the temporary operation of the property nor the payment of such monies by the City should in any way prejudice the City's rights or without such operation and payments or the execution of the agreements constituting an admission on the part of the City of the validity or binding effect upon the City of the lease.

The agreement of March 2, 1936, did not result in the default of interest payments due on the bonds because in the absence of such agreement the City would not have made payments of sums equal to the interest.

49. On March 11, 1936, and prior to the date when the City paid the money equal to the interest referred to in subdivision 47 of this finding and before it had deposited any sums in escrow with The Indiana National Bank as escrow agent, the trustee and two of the principal bondholders of Indianapolis Gas were advised of the making of such agreement and the terms thereof and be-



lieving said agreement to be in the interest of the bondholders and of Chase made no objection thereto but received and accepted the sum of \$171,000 with full knowledge of the terms of said agreement and have been interested continuously since in seeing that said agreement was carried out by the City and that the sums agreed to be paid by the City were actually paid.

The averment in the complaint in this case that said agreement was made in violation of the rights of Chase and its bondholders and was inimical to their interests is not true and was never believed by Chase to be true.

50. On September 9, 1935, the Directors of Citizens Gas adopted a resolution, a copy of which, marked Exhibit 86, is attached to the Stipulation and is by reference made a part of this finding. On the same day, the Board of Trustees of Citizens Gas adopted a resolution, a copy of which, marked Exhibit 87, is attached to the stipulation in this case and by reference made a part of this finding.

Pursuant to the requirements contained in each of said resolutions, the City on September 9, 1935, executed and delivered to Citizens Gas an indemnifying agreement, a correct copy of which, marked Exhibit J, is attached to the second amendment to the complaint in this cause and by reference made a part hereof.

51. Prior to the commencement of this action neither Chase nor any of the bondholders of Indianapolis Gas made any request or demand upon Indianapolis Gas that it commence or prosecute an action in a court of competent jurisdiction to obtain a determination or declaration of the validity or invalidity of the lease.

52. The City has been a first class city within the meaning of the Indiana Statutes continuously since January 1, 1910. No other city of Indiana has been a first class city during any of said period. The City has had a population exceeding 300,000 continuously since January 1, 1920, and no other city of Indiana has had such a population of 300,000 during any of such period.

53. As early as September 19, 1935, Chase was advised by its bondholders who had seen newspaper reports that the City was attempting to abrogate the lease. In a letter of that date addressed to the President of Indianapolis Gas Chase stated.

"We are receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District is attempt-

ing to abrogate the lease made by your Company with Citizens Gas Company in 1913. Bondholders state that such action would materially affect the security of their bonds and we would be obliged if you will be good enough to write us such information as we can pass on to bondholders with respect to this situation."

Neither the City nor Citizens Gas concealed the attitude of Citizens Gas and the City in respect of the City's rejection of an assignment of the lease.

Chase knew at all times from September 19, 1935, of the City's attitude and there was no reason why either City or Citizens Gas should have advised them of such attitude.

54. On September 28, 1935, the firm of which Newton D. Baker was the senior member, was employed by Indianapolis Gas as special counsel in the controversy respecting the validity and enforceability against the City of the lease. That firm gave an opinion on the question of the validity and enforceability against the City of the lease in November, 1935. Mr. Baker's firm continued to represent Indianapolis Gas until May 13, 1936.

On March 11th and April 10th, 1936, meetings were held at the office of Chase in New York attended by representatives of Chase, Indianapolis Gas and two of the principal bondholders of Indianapolis Gas, at which it was agreed:

(a) That the two insurance companies there represented: Massachusetts Mutual and New England Life, would request Chase to obtain an opinion from Mr. Baker's firm as to the validity and enforceability against the City of the lease and whether the costs and expenses including attorneys' fees of Chase in the prosecution of a suit against Indianapolis Gas, the City and Citizens Gas would be a lien against Indianapolis Gas property ahead of its mortgage debt;

(b) Chase would then write to Mr. Baker's firm requesting such an opinion;

(c) If the opinion of Mr. Baker's firm were favorable Chase would request Mr. Baker's firm to bring such a suit.

(d) Thereupon Mr. Baker's firm would ask to be released from its employment to Indianapolis Gas. Indianapolis Gas would accede to this request, Mr. Baker's firm would accept Chase's employment and would thereupon sue Indianapolis Gas, which, up to that time, it had represented.

This plan was carried out as projected.

55. Attorneys for Indianapolis Gas and Mr. Baker's firm then representing Indianapolis Gas, started the work of preparing a complaint against Indianapolis Gas and at the time this complaint was drafted, and towards the stage of completion, it had been wholly prepared by attorneys representing Indianapolis Gas and no one else.

After Mr. Baker's firm had been released from its employment by Indianapolis Gas it consulted and advised with Indianapolis Gas attorneys residing in Indianapolis as to the preparation and form of the complaint, accepted suggestions made by Indianapolis Gas attorneys in respect thereof and co-operated with Indianapolis Gas attorneys in the preparation and filing of the complaint.

After the complaint was filed Mr. Baker's firm then representing Chase, and local attorneys for Indianapolis Gas, consulted and advised with each other both as to the facts and the law in the presentation and prosecution of the case.

The temporary relief asked for in the complaint was never intended to be urged upon the court and that in fact in the three years in which this case has been pending no such temporary relief has been requested except by the formal prayer in the complaint.

This action was commenced by Chase at the joint request of Indianapolis Gas and its bondholders and was brought and maintained collusively by Chase and Indianapolis Gas in order that the suit might be brought in a Federal Court; that there is no collision of interest between Chase and Indianapolis Gas; that Chase and Indianapolis Gas have actively cooperated in the maintenance of this litigation.

Upon the foregoing Findings of Fact, the Court makes and states the following

This action was commenced by Chase at the joint request of Indianapolis Gas and its bondholders and was brought by Chase in order that the suit might be brought in a Federal Court.

### CONCLUSIONS OF LAW:

1. This suit was collusively brought and has been collusively maintained by Chase and Indianapolis Gas; there was not at the commencement of this action and never has been collision of interest between Chase and

Indianapolis Gas; the interest of Chase and Indianapolis Gas in this case is joint and that interest is to secure a declaration of the validity and binding effect upon the City of the lease; the prayer for temporary relief in the complaint was not inserted for the purpose of obtaining such relief, but merely for the purpose of showing an apparent collision of interest; this action was commenced at the joint request of Indianapolis Gas and its bondholders and there has been active cooperation between Chase and Indianapolis Gas in the commencement and prosecution of this suit.

2. Because of the collusive nature of the action the City is entitled to a judgment against Chase for its reasonable costs, expenses and attorneys' fees in defending this collusive suit.

3. This cause is hereby referred to ..... as Special Master for the purpose of ascertaining and reporting to this court the amount of the City's reasonable costs, expenses and attorneys' fees in defending this action.

4. Upon such report of the Special Master being made and being approved or modified by the court the City is entitled to have judgment against Chase for the amount of its reasonable costs, expenses and attorneys' fees and to have this case dismissed for want of jurisdiction.

#### OR ALTERNATIVELY.

1. The order of the Public Service Commission approving the lease; and the judgments and decrees in the Fishback, Todd and Williams cases are not res adjudicata of the validity and binding effect of the lease upon the City.

2. The City is not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

3. The lease is invalid and unenforceable against the City for each of the following reasons:

(a) Citizen's Gas as initial trustee of a public charitable trust with a fixed date of expiration of its trusteeship had no power or authority to execute a lease for 82 years beyond the expiration of its term of trusteeship which would be binding upon or enforceable against its successor trustee, the City, a municipal corporation.

(b) The trust instruments conferred no specific power

upon the initial trustee to execute such a lease as Lessee and properly construed precluded the initial trustee from executing such a lease.

(c) Said lease was executed in violation of the terms of an Indiana statute which prohibited the execution of such a lease without the approval of the Board of Public Works and the Common Council of the City which approval was never obtained. Said statute precluded the execution of any lease for a term of longer than 25 years. A lease executed in violation of this Statute is void and cannot be ratified.

4. The agreement of March 2, 1936, between City and Indianapolis Gas was not inimical to the interests of Chase or the bondholders which it represents.

5. Neither the City nor Indianapolis Gas has violated the terms of the agreement of March 2, 1936, nor is there any valid subsisting controversy as to the proper interpretation of that agreement. Inasmuch as this court has concluded that said lease is invalid and unenforceable against the City it has no power or jurisdiction to determine and fix the rights of Indianapolis Gas and the City under the terms of such agreement.

6. Plaintiff's complaint should be dismissed for want of equity.

Respectfully submitted,

Edward H. Knight,  
*Corporation Counsel,*

Michael B. Reddington,  
*City Attorney,*

William H. Thompson,

Albert L. Rabb,

Patrick J. Smith,

*Solicitors for City of Indianapolis and individual defendants who are members of the Board of Trustees and Directors of the Department of Utilities of said City.*

July 5, 1939.

Submitted  
July 6,  
1930.

382 The following is the request of defendant, Citizens Gas Company of Indianapolis, for findings of fact and conclusions of law submitted July 6, 1939:

383 IN THE DISTRICT COURT OF THE UNITED STATES.

\* \* (Consolidated Caption—1844 and 1950) \* \*

REQUEST OF DEFENDANT, CITIZENS GAS COMPANY OF INDIANAPOLIS, FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Citizens Gas Company of Indianapolis, a defendant in the above-entitled consolidated cause, respectfully submits and requests the adoption of the following proposed findings of fact and conclusions of law:

Findings of Fact.

(1) Citizens Gas Company of Indianapolis (hereinafter referred to as "Citizens") was organized on the 23rd day of May, 1906, under the general laws of the State of Indiana, providing for the incorporation of manufacturing and mining companies, its purposes and obligations being fixed and controlled entirely by its Articles of Incorporation, as amended, its By-Laws, and the certain franchise ordinance and contract granted and entered into on the 25th day of August, 1905, by and between the City of Indianapolis, acting by and through its Common Council, and Alfred F. Potts, Frank D. Stallaker and Lorenz Schmidt. Copies of said instruments and enactment as contained in the stipulation of the parties offered in evidence as Plaintiffs' Exhibit One, are adopted by the Court as part of these findings of fact.

(2) That by virtue of such instruments and enactment Citizens became the initial trustee of a public charitable trust for the benefit of the present and prospective gas consumers of the City of Indianapolis, and all of the rights, property and assets then or thereafter acquired by Citizens were held by it as such initial trustee, and for the purposes and upon the terms and conditions set forth in said instruments and enactment, and no others. Said instruments and enactment provide, among other things, that when the outstanding preferred stock of Citizens shall have been retired and when the holders of the cer-



tificates representing the common stock of Citizens shall have received, by dividends or otherwise, upon such certificates an amount equal to the face value thereof together with interest thereon at the rate provided for, the said certificates shall all be deemed fully paid and canceled, and it shall thereupon be the duty of the Voting Trustees and Board of Directors of Citizens to convey to the City of Indianapolis all the right, title and interest of 385 Citizens in all of its said property, subject to all of the legal obligations of Citizens, to be owned and operated by the said City of Indianapolis, and that thereafter Citizens shall be wound up.

(3) The sole purpose and object of the creation, organization and existence of Citizens was to act and perform the duties of initial trustee of the said public charitable trust, as specifically set forth in the said instruments and enactment, and Citizens had no power or authority, as a corporation, to act otherwise.

(4) Prior to September 30, 1913, and at all times subsequent thereto, all persons, including the plaintiffs herein, the defendant Indianapolis Gas Company, and all of the holders of the bonds of the said defendant, either had actual knowledge of, or were bound in law by knowledge of, all of the terms and provisions of the said instruments and enactment and of the purposes, objects, power and authority of Citizens, as aforesaid, including the duty, power and authority of Citizens, at the end of the period of said franchise ordinance, to wit, on August 30, 1930, when the conditions fixed therein precedent to the conveyance and transfer had been fully complied with, to convey and transfer all of the said property to the City of Indianapolis, and thereafter to be wound up.

(5) Prior to September 9, 1935, all of the conditions fixed in the said instruments and enactment as precedent to the duty and authority of Citizens to convey and transfer the said property had been fully and completely performed so that on said date nothing further remained to be performed or done by the City of Indianapolis to entitle it in law to have all of said property conveyed and transferred to it as aforesaid. On said 386 date, Citizens, by its proper corporate officers, executed and delivered instruments of conveyance and transfer of all of the said property to the City of Indianapolis, in the manner and form, and in strict compliance with its duty and authority so to do, as aforesaid.



(6) Citizens had fully and completely complied with all the terms, provisions and obligations of the written lease entered into by and between Citizens and Indianapolis Gas Company under date of September 30, 1913, which written lease was offered in evidence as Plaintiffs' Exhibit One and is made a part of these findings of fact, when, on September 9, 1935, Citizens conveyed, transferred and assigned all of the said property, including the interest in and to the said written lease, to the City of Indianapolis, subject to all the legal obligations of Citizens, including the legal obligation under the said written lease, if any there be, all as aforesaid. As a result of the performance of its duties, power and authority as initial trustee of the said public charitable trust, Citizens divested itself of all of its property of every nature, and ceased doing business of any kind.

(7) Citizens, its Board of Directors, Voting Trustees and Officers, in making the conveyance, transfer and assignment of all of the said property to the City of Indianapolis, as aforesaid, fully and completely performed and exhausted all of the duties, powers and authority of Citizens as initial trustee of the said public charitable trust. Neither Citizens, nor its Board of Directors, Voting Trustees or any of its officers, from and after 387 September 9, 1935, has any further duties, powers or authority as initial trustee of the said public charitable trust, or to hold, own, lease, manage or operate any property or business of any nature whatsoever.

(8) Citizens, its Board of Directors, Voting Trustees and Officers were entirely and completely released and discharged from any and all obligations and duties, of every nature whatsoever, by virtue of the conveyance, transfer and assignment of all of the said property to the City of Indianapolis of September 9, 1935, as aforesaid, including any and all obligations under the said written lease. Citizens has fully and lawfully performed all of its duties and obligations as initial trustee of the said public charitable trust, and its Board of Directors, Voting Trustees and Officers have fully and lawfully performed all of their duties as such, respectively, and neither Citizens nor its Board of Directors, Voting Trustees or any of its officers is under any further obligation to any of the plaintiffs or other defendants herein.

Conclusions of Law.

(1) The plaintiffs herein, and the defendant Indianapolis Gas Company, are estopped to deny that Citizens has been entirely and completely released and discharged from any and all obligations under the said written lease, as a result of the said conveyance and transfer to the City of Indianapolis, as aforesaid, and that the said written lease is not a valid obligation of Citizens at this time.

(2) The said written lease, from and after September 9, 1935, is not a valid or legal obligation of Citizens and Citizens was and is entirely and completely released and discharged from any present or future obligation or liability under the said written lease as a result of the conveyance, transfer and assignment of all of the said property to the City of Indianapolis of September 9, 1935.

Davis, Pantzer, Baltzell & Sparks,  
By William G. Sparks,  
*Counsel for Citizens Gas Company of Indianapolis.*

389 The following is the request of defendant, The Indianapolis Gas Company, for findings of fact and conclusions of law submitted July 8, 1939: Submitted  
July 8,  
1939.

390 IN THE DISTRICT COURT OF THE UNITED STATES.  
\* \* (Caption—1844) \* \*

REQUEST OF DEFENDANT, THE INDIANAPOLIS  
GAS COMPANY, FOR FINDINGS OF FACT AND  
CONCLUSIONS OF LAW.

Louis B. Ewbank,  
William R. Higgins,  
Indianapolis, Ind.,  
*Solicitors for Defendant, The  
Indianapolis Gas Company.*

391 \* \* \* \* \*  
Comes now the Indianapolis Gas Company, a defendant in the above entitled cause, and separately submits and respectfully petitions the adoption of the following Findings of Fact and Conclusions of Law:

### Findings of Fact.

1. The Chase National Bank of the City of New York, Trustee, plaintiff, hereinafter referred to as "plaintiff" is a corporation existing by virtue of the banking laws of the United States and is a resident and citizen of the State of New York; defendants the Citizens Gas Company of Indianapolis and the Indianapolis Gas Company (hereinafter referred to as "Citizens Gas" and "Indianapolis Gas") are each corporations existing by virtue of the laws of Indiana and are citizens of the State of Indiana; defendant City of Indianapolis is a municipal corporation located in the Southern United States Judicial District of Indiana, Indianapolis Division; the individual members of the Board of Trustees and Board of Directors for Utilities for the City of Indianapolis are all and each of them Citizens of the State of Indiana.

2. The amount in controversy between plaintiff and each of said defendants, exclusive of interest and costs, exceeds the sum of \$3,000.00.

3. Indianapolis Gas was incorporated under the general laws of Indiana prior to November 28, 1913, had for many years been engaged in operating a gas manufacturing plant and distributing system in the City of Indianapolis and in selling gas to the inhabitants thereof; that it continued the operation of said gas plant and system until November 28, 1913, when the same was delivered to Citizens Gas in accordance with the provisions of a ninety-nine year lease dated September 30, 1913, hereinafter referred to as "the lease".

4. Citizens Gas was incorporated in 1906 under the general laws of the State of Indiana and was at all times thereafter until September 9, 1935, a public utility operating a gas plant and a gas distributing system in the City of Indianapolis; a true copy of its Articles of Incorporation and amendments thereto, together with its by-laws and franchise are set out in "Exhibit 3" to the complaint and by reference made a part hereof.

5. On October 1, 1902, Indianapolis Gas executed its certain mortgage deed of trust to secure the payment of the principal and interest of its First Consolidated Mortgage Five Per Cent Gold Bonds (hereinafter referred to as "bonds") which were authorized in the principal amount of \$7,500,000.00; the interest on said bonds was payable semi-annually on the first days of April and

October of each year. Plaintiff herein is now and has been, since March 1935, the sole trustee under said mortgage indenture; a true copy of said mortgage deed of trust is set out as "Exhibit A" to the complaint and 392 by reference made a part hereof.

6. There are now and were, when this action was instituted, issued and outstanding in the hands of the public bonds of Indianapolis Gas in the total principal amount of \$6,881,000.00; said bonds and coupons attached are in the form set out in the mortgage last above referred to.

7. Citizens Gas during its entire existence until the 9th day of September, 1935, held its said gas properties as a trustee of a public charitable trust, the beneficiaries of which were the gas users and residents of the city of Indianapolis.

8. Prior to the 26th day of February, 1913, the Trustees and Directors of Citizens Gas suggested and requested that one Volney T. Malott and a group of Indianapolis businessmen purchase the capital stock of Indianapolis Gas, or an amount in excess of three-fourths thereof, thereby making possible a merger of the systems of the two companies under the unified control and operation of Citizens Gas; and the purchase of the capital stock of the Indianapolis Gas was made by said Indianapolis syndicate in reliance upon the agreement of Citizens Gas that it would execute a lease of the former's property for a period of ninety-nine years during which it would hold and operate the same under the terms and rental provisions as set out in a certain lease.

9. On September 30, 1913, Citizens Gas and Indianapolis Gas entered into a certain contract of lease, hereinafter called "lease"; a correct copy of said lease is attached as "Exhibit B" to the Bill of Complaint and is by reference made a part hereof.

10. All property leased by Indianapolis Gas was covered by and included in its said mortgage.

11. Said lease contains the following provisions, among others.

(a) The entire gas system including its manufacturing plant and distributing system was leased to Citizens Gas for a period of ninety-nine years from the first day of October, 1913.

(b) As part of the rental provided, lessee and its successors and assigns agreed to pay \$120,000.00 annually as dividends on the outstanding capital stock of Indianapolis Gas, the par value of which was \$2,000,000.00.

(c) As part of the rental provided, lessee and its successors and assigns agreed to pay all interest charges on the bonds of Indianapolis Gas payable during the term of the lease.

(d) The lessor agreed to call upon the trustee for certification and delivery to it of bonds which were in turn to be delivered to lessee in payment of ninety per cent of the cost of any extensions or betterments as might be made by lessee to the leased property.

12. On said 30th day of September, 1913, bonds of Indianapolis Gas had been issued and were outstanding in the principal amount of \$4,833,000.00.

13. On May 21, 1913, Indianapolis Gas and Citizens Gas filed a joint petition with the Public Service Commission of Indiana for approval of the proposed lease; this petition is correctly set forth on pages 3 and 4 of the plaintiff's "Exhibit 13" (the complaint in *Fishback vs. Public 393 Service Commission et al.*) and is by reference made a part hereof.

14. Prior to the ruling and order on said petition, one Frank S. Fishback filed with the Public Service Commission an intervening petition opposing the approval of the proposed lease jointly petitioned by Citizens Gas and Indianapolis Gas; a correct copy of said petition is set forth at pages 4 to 7 of plaintiff's "Exhibit 13" and is by reference made a part hereof.

15. On or about October 1, 1913, the Public Service Commission, after a full hearing in the premises, granted the joint petition of Citizens Gas and Indianapolis Gas and approved the execution of said lease; a correct copy of the finding and order of said commission is attached to the Bill of Complaint and marked "Exhibit D", and is by reference made a part hereof.

16. Upon denial by the Public Service Commission of the intervening petition formerly filed by Fishback, a petition for re-hearing was filed and overruled by the commission on November 28, 1913.

17. In all said proceedings before the Public Service Commission, upon the joint petition of Indianapolis Gas and Citizens Gas, as well as upon the intervening petition of said Frank S. Fishback, the defendant City of Indianapolis was served with notice to appear, and through its duly appointed Corporation Counsel was in fact present at all proceedings had therein; said City through its Corporation Counsel urged upon the commission that its order included

in the lease Section 27½ thereof, which provision was inserted and made part of the lease as approved.

18. At said hearing, said counsel for defendant City joined with counsel for Citizens Gas and Indianapolis Gas in urging the granting of their said joint petition and the overruling of intervening petition of said Fishback.

19. On November 28, 1913, or shortly thereafter, Citizens Gas took possession and control of the gas plant and distributing system of Indianapolis Gas as well as all other property described in the lease and operated said plant and system as a unified part of its own plant and system and as an integral part of the corpus of the charitable trust continuously thereafter until September 9, 1935.

20. On September 30, 1913, Indianapolis Gas owned a distributing system consisting of 383.15 miles of mains and was in the process of making substantial improvements in its manufacturing plant and it also had 41,541 meters in use. Citizens Gas at said time owned and operated 184.52 miles of mains and had 11,165 meters in use.

21. In seeking to secure a leasehold estate in the property of Indianapolis Gas and the control and operation of the same for a period of ninety-nine years under the terms of the proposed lease, the trustees and directors of Citizens Gas were acting upon their judgment and honest belief that the creation of said estate would be to the benefit and advantage of the trust which they then held and operated.

22. The execution of said lease by the Directors and Trustees of Citizens Gas upon order of the Public Service Commission was a reasonable exercise by Citizens Gas of its powers as trustee of a public charitable trust and appropriate to the carrying out of the purposes of the 394 trust under all the existing conditions, including the duration of the trust, the nature of the property and uses to which it might advantageously be put and of all other conditions existing at that time.

23. On November 28, 1913, Frank S. Fishback, as a resident freeholder of Indianapolis and a beneficiary of the public charitable trust, commenced an action in the Superior Court of Marion County, Indiana, against the Public Service Commission of Indiana, City of Indianapolis, Citizens Gas and Indianapolis Gas and sought to have vacated and set aside the order of said commission approving and ordering the execution of said lease.

Attack upon the commissions' order and the lease was upon the following grounds, among others:

(a) That the trustees, directors and officers of Citizens



Gas exceeded their authority in entering into a lease for a period of ninety-nine years.

(b) That the lease, as executed, would prevent the fulfillment of the contract between the City and Citizens Gas and would prevent the City from taking over said gas system.

(c) That the lease was improvident and burdensome from the point of view of Citizens Gas.

(d) That the lease constituted a lien upon the property and earnings of Citizens Gas thereby impairing the obligations of the contract between said company and its stockholders and the City.

(e) That the City of Indianapolis had not given its consent to such lease.

(f) That the Public Service Commission was without power or authority to order said contracting parties to enter into the said lease.

24. Demurrers to the complaint were filed by Public Service Commission, Indianapolis Gas and Citizens Gas and an answer in general denial to all paragraphs of complaint was filed by defendant City.

25. Upon the day of judgment, the plaintiff dismissed his action as against defendant City of Indianapolis and the demurrers of defendant Public Service Commission, Citizens Gas and Indianapolis Gas were sustained; and, on failure of plaintiff to plead over, judgment was rendered in favor of said defendants.

26. Appeal from this judgment was made by plaintiff to the Supreme Court of Indiana where it was denied because of plaintiff's failure to properly perfect said appeal.

27. City of Indianapolis, through its Board of Public Works prior to the final judgment in the Fishback case required and made demand that extensions be made in the mains of the leased property as provided in Section 27 $\frac{1}{2}$ , Sub-section 6, of the lease, and such extensions were made pursuant thereto.

28. The contentions of the City and Citizens Gas in the Fishback case were admissions and acceptance of the fact that the lease, properly construed, provided that the lease hold estate thus created became part and parcel of the res of the public charitable trust; and that both the contracting parties had authority to execute it and the Public Service Commission, the right to approve and authorize it.

395 29. On March 12, 1930, one Allan G. Williams and others instituted suit in the Circuit Court of Marion County, Indiana, on behalf of himself and all other tax-



payers and inhabitants of the City as beneficiaries of the public charitable trust. Indianapolis Gas, Citizens Gas, the City of Indianapolis and members of the City's Board of Public Works, Board of Trustees for Utilities and Board of Directors for Utilities were all made parties defendant and appeared.

The complaint alleged:

- (a) that the lease was invalid;
- (b) that the order of the Public Service Commission approving said lease was unlawful;
- (c) that the lease was burdensome upon the public charitable trust and one improvident from the standpoint of the lessee;
- (d) that the lease was "ultra vires said Citizens Gas Company".

Citizens Gas, City of Indianapolis and the members of its Board of Public Works, Board of Trustees for Utilities, Board of Trustees and Directors for Utilities, separately and severally moved the Court to strike out certain portions of the plaintiff's complaint. As supporting grounds for said motion, said defendants made, among others, the following allegations:

(a) "The Public Service Commission of Indiana has express authority to approve leases between two operating public utilities and, it appearing from the averments of the complaint that such lease did have the approval of the Public Service Commission, the action of that commission can not be collaterally attacked." (Stip. Ex. 37, p. 4.)

(b) There is no averment in the complaint which shows any ground on which the plaintiff can successfully attack collaterally the order of the Public Service Commission approving said lease; there is no showing in the complaint that the commission was without jurisdiction to approve the lease between the Indianapolis Gas Company and Citizens Gas Company or that it exceeded its jurisdiction or that the approval of the lease was procured by any fraud. (Stip. Ex. 37, p. 4.)

(c) "It appearing that the lease so approved by the Public Service Commission has been in full force and effect for nearly seventeen years, and that many millions of dollars have been expended in reliance upon its validity, all persons including plaintiffs (if they have any standing under any circumstances) are estopped to question the validity of the same." (Stip. Ex. 37, p. 5.)

(d) "If the lease is valid, the leasehold estate created thereby constitutes a part of the public charitable trust

and is subject to be administered in the same way as property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid, it would fall without the scope of the trust." (Stip. Ex. 37, p. 7.)

30. The judgment of the Marion Superior Court denied the allegations of the complaint and sustained the contentions made by Citizens Gas and the City. On appeal to the Supreme Court of Indiana, the judgment was affirmed in *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448.

396 31. The contentions made and positions taken by the City and Citizens Gas in the Williams case were admissions by them that the leasehold estate was part and parcel of the public charitable trust for the full term of ninety-nine years and was a construction by them of the City's resolution of March 20, 1929, that said resolution did in fact express an election on the part of said City to succeed to the trusteeship of said trust and to take over all the property operated by Citizens Gas including its leasehold estate in the property of Indianapolis Gas.

32. Between the years 1914 and 1935, Citizens Gas in the sale of Indianapolis Gas bonds made representations that all interest payments on the same were guaranteed by Citizens Gas, and that it had a lease on all the gas property of Indianapolis Gas for a period of ninety-nine years, and by reason thereof had a monopoly of the gas business of Indianapolis. Said bonds were sold on reliance of said representations.

33. On March 20, 1929, resolution by the City's Board of Public Works was made which declared its election to succeed Citizens Gas as trustee of the public charitable trust and demanded of said Citizens Gas all rights, title, interest and ownership of whatever nature or character which said Citizens Gas held and owned in the plant and property it was operating.

It was also provided that said Citizens Gas secure by mortgage, if possible, sufficient sums to pay off and discharge the amounts due its certificate holders and to redeem its preferred stock and then convey to said City the gas property "subject to such mortgage and other legal obligations against said company". The right of the city to furnish and advance funds to pay and discharge the obligations to the owners of certificates and preferred stock was expressly reserved. (Stip. Ex. 22.)

34. On May 7, 1935, the Board of Directors for Utilities passed a resolution authorizing the issuance of the City's gas plan revenue bonds in the total principal amount of

\$8,000,000.00 for the purpose of obtaining funds for the taking over of the property owned by Citizens Gas "and/or in which it has an interest". The form and text of the bonds so authorized was also set out and described the purposes in the same language as above set out.

Said resolution also provided an agreement by City that "when it has obtained the possession of the property operated by Citizens Gas Company of Indianapolis it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost, and maintained in good operating condition; and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and Marion County of Indiana and the towns therein." (Stip. Ex. 47, p. 16.)

Said resolution also provided: "So long as any of said bonds are outstanding and unpaid the City shall not sell, mortgage or dispose of said gas system or any substantial and useful part thereof;" (Stip. Ex. 47, p. 17). A true copy of said resolution is set out as "Exhibit 47" of the Stipulation and is by reference made a part hereof.

35. Pursuant to the resolution of May 7, 1935, the City did execute its revenue bonds in the principal amount of \$8,000,000 and, in connection with the public offering thereof, represented:

397 (a) that the City was taking over "the property operated by Citizens Gas Company";

(b) that said bonds were to be issued to obtain funds to take over "property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest";

(c) that the payment of the bonds would be "secured by a charge upon the revenue from the operation of all the gas system owned and/or operated by the City of Indianapolis";

(d) that the City would secure a system which had enjoyed the exclusive right to supply gas to the inhabitants of Indianapolis;

(e) that the City would use all reasonable efforts to maintain the exclusive right to serve gas in the City of Indianapolis, Marion County;

(f) that the gas system, which would be taken over by the City, included the property leased from Indianapolis Gas for the term of ninety-nine years; under the provisions of which lease the lessee was obligated to pay the interest on the outstanding mortgage bonds of the lessor.

36. A correct copy of the circulars issued by Holsey-

Stewart and Company and Otis and Company, in the public sale of the City's revenue bonds, which circulars contained statements, all of which were known to City, and all of which were approved by the City (except the representations relating to the relative values of the properties of Citizens Gas and Indianapolis Gas) is set out as "Exhibit B" to the answer of defendant City and is by reference made a part hereof.

37. The representations made, approved or authorized by the City in connection with the sale of its revenue bonds were in fact an affirmance by the City of the construction that its resolutions of March 20, 1929, was one demanding succession as trustee to all the property which had been operated by the Citizens Gas, including the leasehold estate.

38. The City's revenue bonds were purchased by Holsey-Stewart and Company and Otis and Company and in turn by the public, all in reliance upon the representations made by the City as set forth in Finding 33, *supra*.

39. Between July 1, 1935, and September 9, 1935, the City caused the sum of \$2,500,000.00 to be paid to the certificate holders of Citizens Gas for the retirement of all said company's common stock. It also caused \$1,050,000.00 to be paid for the redemption of all the Citizens Gas preferred stock and by this means all of said common and preferred stock of said company was redeemed; said payments were made by the City with full knowledge:

(a) of the existence of the ninety-nine year lease between Indianapolis Gas and Citizens Gas and of the continuing obligations of Citizens Gas and the trust it was operating thereunder.

(b) of the fact that, after the transfer of its property to the City, Citizens Gas would be without assets of any kind or character with which to meet the known obligations of the lessee under the lease.

40. On September 9, 1935, Citizens Gas delivered to the City and the City accepted:

(a) a deed of conveyance of all real estate owned;  
398 (b) an instrument of transfer and assignment of all its personal property;

(c) An assignment of the lease executed September 30, 1913, by Citizens Gas and Indianapolis Gas.

Immediately upon acceptance of said instruments, the City recorded the same in the office of the recorder of Marion County, Indiana.

41. On September 9, 1935, the City, through its Board

of Directors for Utilities, took possession and control as successor trustee of all the property which had been operated by Citizens Gas, including the property of Indianapolis Gas under lease, and it has, since said date, continuously operated said property as a unified system.

42. The City, through its board of directors for utilities, has paid:

(a) all interest coupons on the bonds of Indianapolis Gas falling due subsequent to September 9, 1935, to and including those due April 1, 1936.

(b) all insurance premiums for insurance on the property covered by the lease.

(c) all installments of Indiana Gross Income Tax of Indianapolis falling due after September 9, 1935, to and including the payment made on April 15, 1936.

(d) all the State, County and Municipal taxes on the property covered by the lease payable after September 9, 1935.

(e) all installments of Federal Income Tax of Indianapolis Gas payable between September 9, 1935, and December 31, 1936, on account of sums paid by either Citizens Gas or the City to Indianapolis Gas during the years 1934 and 1935.

43. The City has deposited as of April 1, 1939, with the Indiana National Bank as escrow agent pursuant to the agreement of March 2, 1936, the amount of:

(a) \$1,029,450.00, as interest on Indianapolis Gas bonds payable on October 1, 1936, and to and including the semi-annual payment due April 1, 1939. The above payment so deposited equals the interest due on all outstanding bonds, except those held by City in the total principal amount of \$18,000.00.

(b) \$420,000.00, representing the amount of rental paid by way of dividend on the capital stock of Indianapolis Gas due and payable under the provisions of the lease from June 30, 1936, to June 30, 1939.

44. Indianapolis Gas has not concealed or attempted to conceal from plaintiff or its bondholders any true facts relative to conditions surrounding the use and operation of its property or resulting in the default of interest payments on its bonds.

45. The agreement of March 2, 1936, entered into by City and Indianapolis Gas was not inimical to the interests of plaintiff or the bondholders whom it represents.

46. There was no collusion between Indianapolis Gas and plaintiff or any other party to this cause in the bringing or prosecution of this action.

Conclusions of Law.

1. This Court has jurisdiction of this cause on the ground of diversity of citizenship between the parties thereto.

399 2. The lease is now and has been at all times since its approval by the Public Service Commission, a valid, binding and effective lease for the term of ninety-nine years, between Indianapolis Gas and Citizens Gas and its successors and assigns.

3. The finding and order of the Public Service Commission approving the lease is a conclusive and binding determination upon all the parties to this cause and upon the public charitable trust that the lease was fair and reasonable in its terms, in the public interest, and its execution a proper exercise by Citizens Gas of its powers as trustee of a public charitable trust which has been at all times a public utility.

4. The City and Citizens Gas, each by their duly authorized counsel, appeared in the proceedings before the Public Service Commission and each requested of the commission approval of said lease and, by reason thereof and also because of their failure to subsequently object to either its validity or the validity of the order of the Public Service Commission approving the same, they now are each estopped to deny and precluded by their own laches from denying that the lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

5. The judgment of the Superior Court of Marion County in the case of Fishback v. Public Service Commission et al. is binding in all its provisions in the present case upon Citizens Gas and the City and upon the public charitable trust.

6. By reason of the position and contentions taken and made by Citizens Gas and the City in the Fishback case, both Citizens Gas and City are estopped from denying that the lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property conveyed to the City by Citizens Gas for its full term of ninety-nine years.

7. By reason of the representations made by Citizens Gas in the sale of Indianapolis Gas bonds and of its own



securities, and by reason of the fact that said Citizens Gas and the public trust it was administering accepted the value and benefits of said ninety-nine year lease for twenty-two years, Citizens Gas, and the City as present trustee, are estopped from denying and are precluded by their own laches from denying that the lease is now a present valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the corpus of the trust itself for the full term of ninety-nine years.

8. The City, in demanding and securing through its Board of Public Works certain extensions in the mains of Indianapolis Gas in accordance with the provisions of the lease, formally accepted and recognized the validity of said lease.

9. The City's resolution, adopted by its Board of Public Works on March 20, 1929, was an election by the City to take over all of the property which had been operated by Citizens Gas, including the leasehold estate in the property of Indianapolis Gas, and all those obligations attached to the leasehold estate.

10. The judgment of the Superior Court of Marion County in the Williams case is a conclusive determination upon all parties to this cause and upon the public charitable trust of the following matters:

400 (a) That Williams had the right to sue on behalf of said public charitable trust.

(b) That the interests of the beneficiaries of the public charitable trust were and are subordinate to the obligations of the trust as a public utility and to the control exercised over said trust as a public utility by the laws and regulations relating thereto made and provided by the State of Indiana.

(c) That the Lease is a valid and binding obligation of Citizens Gas, the City as successor trustee and of the said public charitable trust for its full term of ninety-nine years.

(d) That the order of the Public Service Commission approving said lease is conclusive and cannot be collaterally attacked.

(e) That Williams and all other beneficiaries of the said public charitable trust and the trustees of said trust are precluded by laches from attacking the validity of said Lease or its binding effect upon the public charitable trust or upon Citizens Gas or the City as successor trustee, for the full term of ninety-nine years.



11. The execution of said lease by Citizens Gas upon order of the Public Service Commission was a reasonable, lawful and valid exercise of its powers as trustee of a charitable trust and appropriate to the carrying out of the purposes of the trust.

12. By reason of the position taken and representations made by each the City and Citizens Gas in the case of *Williams v. Citizens Gas et al.*, the City and Citizens Gas are precluded by their own laches and estopped from denying that the Lease is a valid and binding present obligation of Citizens Gas, of the City as successor trustee of the public charitable trust and of the property received by City from Citizens Gas for its full term of ninety-nine years.

13. By reason of the provisions of the resolution of the City of May 7, 1935, by its Board of Directors for Utilities, and of the representations made by the City in connection with the sale of its revenue bonds, the City is estopped from denying that the Lease is a valid and binding obligation of the City as successor trustee of the public charitable trust or that the leasehold estate is part and parcel of said trust estate.

14. By accepting the deed of conveyance on September 9, 1935, of all the real estate owned by Citizens Gas, which deed expressly provided that the described property was conveyed subject to all the legal obligations of the grantor, and by accepting and having recorded the assignment of Lease, and by taking possession of all said property covered both in the deed and lease, all of said property so conveyed to the City has at all times remained and is now obligated on all the covenants of the lessee as provided in said lease for its full term of ninety-nine years.

15. By reason of its taking possession of the Indianapolis Gas property on September 9, 1935, and its operation thereof until September 30, 1936, the City is estopped from denying that the lease is a valid and binding obligation of the City as successor trustee of the public charitable trust and of the property received by the City from Citizens Gas for its term of ninety-nine years and also that the leasehold estate was part of the res of the said trust.

401 16. By reason of the fact that the City took over all the assets of Citizens Gas and that the sole consideration therefor was paid by it directly to the stockholders and bondholders of Citizens Gas leaving said

Citizens Gas without assets with which to satisfy its obligations, the City is now obligated to pay all liabilities of Citizens Gas.

17. By the provisions of the Lease, all obligations of Indianapolis Gas to its bondholders for payment of interest have been assumed and expressly undertaken by Citizens Gas and its successors and assigns. Such obligations are valid and enforceable against Citizens Gas, the City and all property conveyed to the City by Citizens Gas.

18. The obligation to satisfy such judgment as may be entered in this cause is that of the City Trustee, and the public charitable trust it is administering, and Citizens Gas, as principals; and of Indianapolis Gas, as surety.

19. No obligation is created by the bonds or mortgage indenture of Indianapolis Gas to pay to the holders of its bonds interest on said unpaid bond interest.

20. The agreement of March 2, 1936, between City and Indianapolis Gas was not inimical to the interests of the Trustee or the bondholders whom it represents.

21. The agreement of March 2, 1936, is a valid and binding agreement and the amount paid to the Indiana National Bank as escrow agent representing dividends on the capital stock of Indianapolis Gas should be ordered paid to Indianapolis Gas without awaiting determination of the issues which, under the order of this court heretofore made, are reserved for later hearing.

22. Such an amount from the fund now on deposit with Indiana National Bank as represents the amounts paid thereto by the City as interest payments on the bonds of Indianapolis Gas may be used by the City to satisfy such judgment as shall be herein entered; but no part of said fund as represents the amount paid thereto for dividends on the capital stock of Indianapolis Gas, may be used for such purpose unless and until there shall be a failure to have the balance of said judgment satisfied from the property and the assets of the City as trustee and the public charitable trust.

23. The defendants herein should be held liable for such judgment, as may be entered in the following order:

First, The City of Indianapolis and the property of the public charitable trust received by said City from Citizens Gas.

Second, The Citizens Gas Company of Indianapolis.

Third, The Indianapolis Gas Company.

24. The counter-claim of defendant City should be dismissed and denied for want of equity.

Respectfully submitted,

Louis B. Ewbank,

William R. Higgins,

*Solicitors for Defendant, The  
Indianapolis Gas Company.*

402 And afterwards towit at the May Term of said Court, on the 21st day of September, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

This cause coming on to be finally heard by the Court for the determination of the issues submitted for trial at this time, as defined in the order made and entered herein on the 18th day of January, 1939, and the parties appearing by their respective attorneys, and the Court having heard the evidence and argument of counsel and being sufficiently advised in the premises, now files a memorandum herein.

Filed  
Sept. 21,  
1939.

403 IN THE DISTRICT COURT OF THE UNITED STATES.

\* \* (Caption—1844) \* \*

BALTZELL, *District Judge*:

This is an action in which the plaintiff, The Chase National Bank of the City of New York, as Trustee under a deed of trust executed on October 1, 1902 by the defendant, The Indianapolis Gas Company, to secure the payment of the principal and interest of certain first mortgage bonds, is seeking to recover a judgment against such Gas Company for the amount of the due and unpaid interest upon such bonds. The plaintiff is also seeking, among other things, a declaratory judgment in which judgment it asks the court to declare that a certain lease entered into by and between the defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis on September 30, 1913 is a valid and binding obligation in all its terms and conditions upon the parties thereto and upon the defendants, City of Indianapolis, the Trustees and Directors for Utilities of the City of Indianapolis, and upon all the property formerly owned by the de-

fendant, Citizens Gas Company, which is now owned and operated by the defendant City through its Board of Directors for Utilities.

404 While there have been filed in this action, pursuant to Rule 52 of the Rules of Civil Procedure, Special Findings of Fact and Conclusions of Law to which reference is made for a more detailed statement of the facts, yet it is deemed advisable to briefly sketch the facts leading up to the execution of the lease in question, as well as those following its execution, in order that a clear and logical approach may be had to the proper determination of the questions involved.

During the year 1913, and for many years prior thereto, the defendant, The Indianapolis Gas Company, was the owner of considerable property in Indianapolis consisting of coke ovens, machinery, mains, meters, etc., was engaged in operating a gas manufacturing plant and distributing system in the City of Indianapolis, and was selling gas to the inhabitants of such city. It was the owner of much of such property during the year 1902, and on October 1 of that year it executed a deed of trust (hereinafter referred to as a mortgage) to the Trust Company of America, of New York City, and Ferdinand Winter of Indianapolis, as Trustees to secure the payment of bonds in the aggregate principal amount of \$7,500,000.00. Such mortgage covered all of its property then owned by it, as well as after acquired property. Because of the death of Trustee Winter and various mergers and consolidations, The Chase National Bank of New York City has become and now is the sole Trustee under such mortgage. While the mortgage provided for the issuance of \$7,500,000.00 of bonds yet there were originally issued and authenticated only \$4,000,000.00. The mortgage, however, also provided that additional bonds could be issued to acquire additional property or for improvements, extensions, enlargements, etc., and under this provision \$833,000.00 in principal of additional bonds were issued prior to September 30, 1913, and \$2,048,000.00 in principal  
405 issued subsequent to that date, so that there are now outstanding and unpaid of such bonds the principal amount of \$6,881,000.00, of which amount the City of Indianapolis is the owner of \$18,000.00 principal, and The Indianapolis Gas Company of \$120,000.00 principal. The bonds thus issued and authenticated were sold to the public generally. The Indianapolis Gas Company is an Indiana corporation and its common capital stock consists of

forty thousand shares of the total par value of \$2,000,000.00.

The defendant, Citizens Gas Company, is an Indiana corporation and was organized in 1906 under the general laws providing for the incorporation of manufacturing and mining companies, and for the express purpose of becoming the initial trustee of a public charitable trust, which trustee was to supply "the City of Indianapolis and its inhabitants with light, heat and power." Prior to its organization on, to-wit: the 25th day of August, 1905, a contract and agreement had been entered into by and between the defendant, City of Indianapolis, by and through its Board of Public Works and three of its citizens, namely, Alfred F. Potts, Frank D. Stalnaker and Lorens Schmidt, wherein such three ~~named~~ citizens were given permission, subject to the ratification and approval of the Common Council of such City, to enter upon the streets, alleys, avenues and other public places and parts of such city for the purpose of excavating and laying, maintaining, operating and repairing a system of mains or pipes for the distribution of gas to the citizens of such City and the users of gas therein. This contract or franchise was approved by the Common Council on August 30, 1905. As a condition precedent, however, to the exercise of any of the rights conferred by such franchise, the

said Potts, Stalnaker and Schmidt were to "organize  
406 a corporation under and in accordance with the laws of Indiana to carry out the purposes of this grant, to which corporation this franchise and all interests thereunder shall be assigned, which articles of incorporation shall, among other matters, provide • • •" for the amount of the capital stock, for the placing of the entire capital stock under the control of five trustees who shall be stockholders in the company, *for the order in which the earnings of such company shall be used*, for the conveyance of the gas plant and property owned by such company to the City of Indianapolis to be owned and operated or leased by it upon the receipt by the certificate holders of the capital stock of such company, by dividends or otherwise, of an amount equal to the face value thereof together with interest thereon at the rate of ten per cent per annum, etc. The term of the franchise was for a period of twenty-five years from and after the date of its ratification or from August 30, 1905 and "thereafter all the rights of said company to occupy the streets

and alleys of said city shall terminate and cease." Pursuant to the terms of this franchise, the defendant, Citizens Gas Company, was organized, and such franchise was assigned by the said Potts, Stalnaker and Schmidt to such company on May 24, 1906, by virtue of which it began its activities and began laying mains and supplying gas to the citizens of Indianapolis. The defendant, The Indianapolis Gas Company, was also providing gas to the citizens of Indianapolis at that time. This was prior to the enactment of the law providing that the Public Service Commission of Indiana should supervise all public utilities in the state and, therefore, gas was furnished the users of Indianapolis by both the defendants, The Indianapolis Gas Company and Citizens Gas Company for several years thereafter without such supervision.

407 At the time of the issuance and execution of such franchise contract and at the time of the organization of the defendant Citizens Gas Company, "there existed in the City of Indianapolis", as was said by this court in its Memorandum filed in the case of *Todd vs. Citizens Gas Company, et al.*, In Equity No. 1191, "a rather peculiar situation. The supply of natural gas, which had been used by the citizens of the city for a number of years, had been practically exhausted. Much litigation had taken place with reference to the rights of the Consumers Gas Trust Company, under a franchise which it held with the city, as to whether or not such franchise gave it the right to supply artificial gas to the citizens of the City of Indianapolis. It had just been determined by the courts that the Consumers Gas Trust Company had no rights under its franchise, and therefore, the Board of Public Works and the City Council were anxious that a plant be erected for the purpose of supplying to the citizens of the City of Indianapolis artificial gas at as low a rate as possible. Profiting by its past experience, the city proceeded to negotiate the terms of a franchise whereby, in its opinion, the rights of its citizens would be protected against exorbitant rates, and its beneficial interest in the property be fully preserved. That the city had this in mind is emphasized by the fact that under the terms of the franchise, it was mandatory upon the part of Potts, *et al.*, that they form a corporation and incorporate into the Articles thereof certain provisions with reference to the issuance of beneficial certificates, the interest of such certificate holders, the appointment of trustees, the management of its affairs, etc. as a condition precedent



to the issuance of such franchise." It was this situation which confronted the citizens of Indianapolis and their public officials which gave birth to the franchise issued to

Potts, *et al.*, and to the organization of the defendant 408 Citizens Gas Company, which became the initial trustee of the Public Charitable Trust thus created, as adjudicated by the courts almost twenty-five years later. See—*Todd v. Citizens Gas Company of Indianapolis, et al.*, 46 F. (2d) 855.

In order that competition be eliminated and gas furnished to the users thereof in Indianapolis by one company only, the defendants, The Indianapolis Gas Company and Citizens Gas Company, began negotiations in the early part of 1913 through Mr. Volney T. Malott, *et al.*, looking to a merger of the systems of the two companies under the unified control and management of the defendant, Citizens Gas Company. These negotiations continued for a considerable length of time and finally consummated in the execution of the lease in question on September 30, 1913, in which all of the property of the defendant, The Indianapolis Gas Company, was leased by it to the defendant, Citizens Gas Company, for a term of ninety-nine years under certain conditions and for a certain consideration as rental therein fully set forth. As a part of such rental, the lessee agreed to pay the sum of \$120,000.00 per year, which sum is equal to a six per cent return upon the par value of the entire outstanding common capital stock of the lessor. The lessee further agreed to pay all interest charges upon the outstanding bonded indebtedness of the lessor, which, at that time, amounted to \$4,833,000.00, and was later increased to a total principal of \$6,881,000.00, the annual interest rate being five per cent. As a further part of the rental, the lessee was to pay all taxes of every kind and description, for which the lessor would become liable. The lease is a very lengthy one, and all the terms and conditions are therein fully set forth, of which the above are only a few.

409 Prior to the execution of the lease, the law creating the Public Service Commission of Indiana and giving it supervision over all public utilities within the state, known as the Shively-Spencer Utility Commission Act, had been enacted and was in force. By virtue of the provisions of that law it was necessary to submit a lease of the character of the one in question to such Commission for its inspection and approval before it could become



effective. Consequently such lease was submitted to such Commission upon a joint petition of both lessor and lessee, and approved by it. After its approval, the defendant, Citizens Gas Company, took possession of the leased property and continued to operate it in conjunction with its own property under the franchise theretofore granted by the City of Indianapolis until the 27th day of August, 1921, at which time, pursuant to the provisions of the Shively-Spencer Utility Commission Act, it surrendered its franchise, accepted an indeterminate permit and continued to operate thereunder as it had a legal right to do. On the same day it filed in the office of the Secretary of State a document containing certain amendments to its Articles of Incorporation. These amended articles provided for the manner of payment of the beneficial certificates similar to the original Articles, provided for the mortgaging or bonding of its property for a specific purpose, for the issuance of preferred stock, for the transfer of the property to the City of Indianapolis. The surrender of the franchise transferred to the Public Service Commission authority to regulate the business of the Citizens Gas Company insofar as its relation to the public is concerned and did not in any manner affect the validity of the franchise granted in 1905 by the City. (*Todd v. Citizens Gas Company, et al., supra.*)

410 On March 20, 1929, the defendant, City of Indianapolis, by resolution of its Board of Public Works, among other things, formally declared its intention to take over "all rights, title, interest and ownership of whatever nature and character" which were then held and owned by the defendant, Citizens Gas Company, and to exercise its rights as successor trustee of the Public Charitable Trust theretofore created. A copy of the resolution was served upon the said Gas Company and it, by resolutions of its directors, approved by its Board of Trustees on April 3, 1929, formally accepted the demands of the City and thereby resolved that it would proceed to carry out its obligations to its beneficial certificate holders and preferred stockholders when convey its property and assets to the City in accordance with the provisions of its franchise, etc. Thereafter on, to-wit: April 30, 1929, Newton Todd, owner of a beneficial certificate of the defendant, Citizens Gas Company, filed an action in this court in which the Citizens Gas Company, the voting trustees of its common stock, the City of In-

dianapolis, the Mayor, Clerk, and members of its Board of Public Works were defendants, in which action he sought, among other things, to enjoin the Citizens Gas Company and individual defendants from carrying into effect the resolutions theretofore adopted by them in which they recognized the existence of a trust and acknowledged the right of the City to take over the property and assets of the Gas Company as Trustee pursuant to the terms of its franchise, etc. In that action there was placed at issue for the first time for determination the question of whether there was, in fact, a Public Charitable Trust created by the franchise, etc. of 1905, and that question was answered in the affirmative by both this court and by the Circuit Court of Appeals, and 411 application for a writ of certiorari was denied by the Supreme Court of the United States on May 18, 1931. (*Todd v. Citizens Gas Company, et al., supra.*) Partially, if not entirely because of the delay occasioned by the litigation of the *Todd v. Citizens Gas Company, et al. case, supra* and the case of *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448, 188 N. E. 212, which was instituted in a Superior Court of Marion County on May 12, 1930, the transfer of the property from the Citizens Gas Company to the City was not made until September 9, 1935.

The defendant, Citizens Gas Company, paid, or caused to be paid, dividends to its common stockholders from the date of its organization to June 30, 1935 at the rate of ten per cent per annum upon the par value of such stock. By proper resolution of the Board of Directors for Utilities of the City of Indianapolis, advertisement, etc., Indianapolis Gas Plant Revenue Bonds were issued and sold during the month of May, 1935, and the proceeds thereof were received by the defendant City on June 27 of that year. From the proceeds of the sale of such bonds, the defendant City retired all of the common stock of the defendant, Citizens Gas Company at a cost of \$2,500,000.00, which was in full payment of the par value thereof, together with interest thereon at the rate of ten per cent per annum. In addition thereto, the defendant City caused to be paid to the preferred stockholders of the defendant Citizens Gas Company on or about September 1, 1935 the sum of \$1,050,000.00 in full satisfaction and redemption of all outstanding preferred stock. There was outstanding on August 12, 1935 bonds of the defendant Citizens Gas Company in the principal

sum of \$2,745,000.00, all of which, with the exception of \$32,000.00 have been fully paid by the defendant City pursuant to resolution of its Board of Directors for Utilities.

On September 9, 1935, the defendant Citizens Gas Company executed and transmitted to the defendant City 412 as its successor trustee the following four instruments, to-wit: an instrument of Transfer and Assignment of Personal Property, Assignment of Lease assigning the lease in question, a Deed of conveyance of real estate and assignment of a lease to part of the Majestic Building in the City of Indianapolis, which said four instruments thus executed and transmitted purported to transfer to the defendant City, as Trustee, all of the property of the defendant, Citizens Gas Company. There was included in such transfer cash or current funds in the sum of approximately \$411,000.00. Prior to the transmittal of such four instruments by the defendant, Citizens Gas Company, there had been adopted by the defendant Board of Directors for Utilities a resolution rejecting the lease in question as a part of the assets of the trust transferred to it, and a copy of such resolution and a formal rejection of the lease was delivered to the attorney for the defendant, Citizens Gas Company, at the same time that he transmitted the four instruments of conveyance, including the assignment of such lease, to a representative of the said Board of Directors. The attorney for such defendant Gas Company, while acting on behalf of such company, had been advised by the defendant City on or about August 27, 1935 as to its attitude as to whether it would accept an assignment of such lease as a part of the assets of such company, and he knew such attitude at the time of the preparation and transmittal of such assignment. Such attorney knew at the time of the preparation of the assignment and at the time he transmitted physically the four instruments of conveyance above set forth that the City would, in turn, deliver physically to him a written rejection of such lease. The four instruments of conveyance were, however, turned over physically by him to a representative of the defendant City and all, including the assignment, were placed of record by such representative in the Recorder's Office of Marion County, Indiana.

413 The defendant City, as Trustee, took possession of all the property of the defendant, Citizens Gas Com-

pany, immediately following its transfer and began its operation and continued to operate such property and supply gas to the citizens of Indianapolis continuously since that date. In such operation it has operated the plant of the defendant, The Indianapolis Gas Company, in the same physical manner as it had been theretofore operated by the defendant, Citizens Gas Company, under an agreement, however, with said The Indianapolis Gas Company that such operation would not prejudice the rights of either the City or the said Gas Company; neither would such operation be a recognition of the validity of such lease on behalf of the City nor an admission of its invalidity on behalf of such Gas Company.

On March 2, 1936, the defendant, City, and The Indianapolis Gas Company, entered into a written agreement with reference to the continued operation of the plant of such Gas Company pending a settlement or judicial determination of the dispute over the validity of the lease in question. By the terms of such agreement, the defendant City was to continue the use of the property of the defendant, The Indianapolis Gas Company, the same as theretofore, and was to deposit with the escrow agent, The Indiana National Bank, of Indianapolis, sums of money equal to the payments required under such lease, such sums to be held by such agent and paid out by it pursuant to any settlement agreement or, upon judicial determination that the lease was valid, the entire amount should be paid to the defendant, The Indianapolis Gas Company. If, however, the lease is held to be invalid as to the defendant City or the property acquired by it, then reasonable compensation for the use of the mortgaged property (fixed by agreement or by the court) shall be paid by the escrow agent to the Indianapolis Gas Company, and the balance paid to the City of Indianapolis. This contract also  
414 provides for the payment of the sum of approximately \$171,000.00 to The Indianapolis Gas Company on or before March 25, being an amount equal to the interest due upon the bonds of The Indianapolis Gas Company to March 30, 1936. This provision, as well as all other provisions of the contract, has been fully complied with by the defendant City. No interest upon such bonds has been paid to the bondholders since that date, but a sum sufficient to pay such interest is upon deposit with the escrow agent. In addition, all taxes due upon the property of The Indianapolis Gas Company, as well as all income taxes, have been fully paid by the City, and all needed repairs of

its property have been made by the City. This agreement further provides that neither its execution nor the carrying out of its provisions is to prejudice the rights of either the defendant City or the defendant, The Indianapolis Gas Company, or to be construed as an admission of either the validity or invalidity of the lease on the part of either of them. On March 11, 1936, and prior to the payment by the defendant City of the sum of \$171,000.00 above referred to, and prior to the payment of any sums by it to the escrow agent under the contract of March 2, the plaintiff was advised of the execution of such contract, and of its terms and conditions.

Under the issues presented at this hearing, there are submitted five questions for determination:

*First:* As bearing upon the question of jurisdiction—whether there is, in fact, as shown by the evidence, a collision of interest between the plaintiff and the defendant, The Indianapolis Gas Company, or whether the collision as shown by the allegations of the bill of complaint is apparent only and was actually  
415 brought about by the collusion of the plaintiff and defendant. The Indianapolis Gas Company, for the purpose of conferring jurisdiction upon this court, as charged in the answer of the defendant, City of Indianapolis.

*Second:* If the answer to the first question is that there is, in fact, a collision of interest between the plaintiff and the defendant, The Indianapolis Gas Company, as charged in the bill of complaint, that such collision is real, not brought about by the collusion of the plaintiff and said defendant, as charged in the answer of the defendant City, and that this court has jurisdiction to hear and determine the issues presented, then, in logical sequence, the next and primary question to be determined is whether the lease of September 30, 1913, entered into upon that date by and between the defendants, The Indianapolis Gas Company and the Citizens Gas Company, is valid and enforceable as against the defendant City, as successor trustee, and the questions of estoppel presented by plaintiff.

*Third:* The amount of the judgment to be rendered in favor of plaintiff against the defendant, The Indianapolis Gas Company, because of the default in the payment of the due and unpaid interest upon the bonds of said company.

416 *Fourth:* The liability of the defendant, Citizens Gas Company, and, if liable, the extent of such liability.

*Fifth:* The liability of the defendant, City of Indianapolis, and, if liable, the extent of such liability under the limited issues here presented.

These questions will be considered and determined in the order presented. If, however, it is determined that this court has no jurisdiction because of collusion, then it will not be necessary to consider any of the questions presented, except the first above enumerated.

The question of whether there was any collision of interest between the plaintiff and the defendant, The Indianapolis Gas Company, *as shown by the averments contained in the bill of complaint and averments contained in the answer of the defendant, The Indianapolis Gas Company*, was determined by this court adversely to the contention of plaintiff when originally presented in August, 1937. At that time this court was of the opinion that, *as shown by the pleadings*, the interests of plaintiff and the defendant, The Indianapolis Gas Company, were identical; that the defendant, The Indianapolis Gas Company, was an indispensable party; that said defendant Gas Company should be realigned as a party plaintiff and when thus aligned the bill of complaint should be dismissed because diversity of citizenship, upon which jurisdiction depends would then be destroyed, since both The Indianapolis Gas Company and the defendant, Citizens Gas Company, are Indiana corporations and as such are citizens of that state. Consequently, the bill was dismissed, but, upon appeal by plaintiff to the Circuit Court of Appeals the case was reversed and in the course of its opinion upon the question of realignment that court said: "While it seems apparent  
417 that the essential question involved is whether the lease in question is enforceable against the City, and that both appellant and the Indianapolis Company are so contending, yet there are other important questions which give rise to controversies between appellant and the Indianapolis Company. \* \* \* If it be conceded, however, that appellant and the Indianapolis Company occupy a similar position with respect to the validity and enforcement of the lease against the City, yet we think there are sufficient matters in controversy between them to prevent the latter from being aligned with appellant as plaintiff. The rule seems to be that before such realignment may be required, the parties must be in substantial accord upon all issues presented." *Chase National Bank, etc. v. Citizens Gas Com-*



pany, et al., 96 F. (2d) 363. Thus it is established as the law of this case that collision of interests between plaintiff and the defendant, The Indianapolis Gas Company, as shown by the pleadings, does exist. Hence this court does have jurisdiction unless it is shown by the evidence that there is no actual collision of interest and that such collision as is shown by the pleadings is apparent only and the result of collusion, as charged in the answer of the defendant City. In that event jurisdiction is destroyed. (28 USCA 80.)

It is the contention of the defendant City that the collision of interest asserted in the pleadings "is apparent only and has been brought about as the result of collusion and concert between" the plaintiff and the defendant, The Indianapolis Gas Company. Thus, the question of collusion as a fact between such parties is open for decision, such issue being presented by subdivision 26 of the answer of the defendant City in which it is alleged "that the plaintiff has no right to maintain this action and that this suit is 418 a collusive one." This subdivision of answer contains certain alleged facts upon which such defendant relies to establish collusion between such parties in the institution and maintenance of this action, among which are "(e) That the Indianapolis Gas Company has cooperated with plaintiff in the preparation of the complaint in this cause". Even though it has been heretofore decided that there is a collision of interests between the plaintiff and defendant, The Indianapolis Gas Company, upon the face of the pleadings, that decision does not preclude the court from making inquiry as to collusion, as a fact, when that issue is presented by the issues as in the instant case. It now becomes a question of fact to be determined from the evidence as to whether or not there was collusion, as charged, and, if so, this court is deprived of jurisdiction. The Supreme Court of the United States, in the case of *Hartog v. Memory*, 116 U. S. 588, 29 L. Ed. 725, thus held, wherein in the course of its opinion, it said: "If in the course of a trial it appears by the evidence, which is admissible under the pleadings and pertinent to the issues joined \* \* \* that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit."

See, also:

*Wheeler v. Denver*, 229 U. S. 342, 57 L. Ed. 1219.

*United States v. Butterworth-Judson Corporation*,  
269 U. S. 504, 46 S. Ct. 179, 70 L. Ed. 380.



At the outset it may be observed that it is apparent that both the plaintiff and defendant, The Indianapolis Gas Company, preferred the Federal Court in which to institute and maintain this litigation. The plaintiff in its brief says: "There is no secret about the fact that the Trustee *preferred* the jurisdiction of the Federal Court." It also said in its brief that, "It may be—though the evi-

dence does not expressly show the fact—that Indianapolis Gas also preferred the jurisdiction of the Federal Court." That such preferences existed and were actually expressed either verbally or in exchange of letters between such parties prior to and at the time of the institution of this action and since its institution there can be no doubt, but such expressions of preference are insufficient to constitute collusion. Litigants have the right to select the forum of their choice in the institution and maintenance of an action so long as no improper acts which constitute collusion are resorted to for the purpose of conferring jurisdiction upon the court in which such action is instituted and maintained. This principle of law was well stated many years ago by Mr. Justice Pecknam in the case of *In Re Metropolitan Railway Receivership*, 208 U. S. 90; 28 S. Ct. 219; 52 L. Ed. 403, as follows: "That the parties preferred to take the subject matter of the litigation into the Federal Courts, instead of proceeding in one of the courts of the state, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal Court attached, the motive for bringing the suit there is unimportant." With this principle of law, the defendant City, in its brief, agrees; however, it asserts that the acts and conduct of the plaintiff and defendant, The Indianapolis Gas Company, went far beyond the bounds fixed by this principle in an effort to confer jurisdiction upon this court, and that such acts and conduct, as a fact, amount to collusion.

The charge of collusion greatly exceeds an agreement or understanding between a plaintiff and defendant that an action will be begun by plaintiff against the defendant in a certain court and, in fact, it extends beyond the joint preparation by them of a bill of complaint or of the assistance of either of them in such preparation. A defendant may agree to be sued in a Federal Court, may make suggestions as to allegations to be contained in the complaint and may assist in its preparation, but so long as there are no improper or fraudulent acts done in such agreement and no allegations made in the

complaint which are untrue and unprovable, known to be such at the time made, and made fraudulently and intentionally for the purpose of conferring jurisdiction upon the court, no collusion exists. As was said by Judge Sparks in the case of *Lincoln Printing Company v. Middle West Utilities Company*, 74 F. (2d) 779, "The mere fact that a debtor or his attorneys have previously arranged with a creditor for the filing of the bill does not render the action fraudulent."

The provisions of the statute upon which defendant City relies which give this court authority to dismiss this action upon the ground of collusion is found in Section 37 of the Judicial Code, as follows. "If in any suit commenced in a district court \* \* \* it shall appear to the satisfaction of the said district court, at any time after such suit has been brought \* \* \* that the parties to said suit have been improperly or collusively made or joined, either as plaintiff or defendant, for the purpose of creating a case cognizable \* \* \* the said district court shall proceed no further therein, but shall dismiss the suit \* \* \*." (28 U. S. C. A. 80.) As defined by Bouvier's Dictionary, and as accepted by the courts, the term "collusion", as used in this section of the statute, means "an agreement between two or more persons to defraud a person of his rights by the forms of law or to obtain an object forbidden by law." When collusion exists, fraud must be present and is implied from the very acts which constitute the collusion. Mr. Justice McKenna, speaking in the case of *Wheeler, et al. v. Denver*, *supra*, said: "The sole question is whether there was collusion to give the court jurisdiction of the cause; and, of course, the existence of collusion implies the existence of fraud." See—*Cashman v. Amador & Sacramento Canal Company, et al.*, 118 U. S. 58; 30 L. Ed. 72. It was also said, in the case of *Lincoln Printing Co. 421 v. Middle West Utilities Co.*, *supra*, "It is clear that there must be fraud before there can be collusion and it has been so held in construing Section 37 of the Judicial Code (28 U. S. C. A. 80) which authorizes the dismissal of suits in federal courts for collusion." *In re Metropolitan Receivership*, *supra*.

There can be no doubt but that both plaintiff and the defendant, The Indianapolis Gas Company, have at all times asserted that the lease in question is valid and is binding upon the City, as Trustee. Neither is there any

doubt as to their interest in sustaining the validity of such lease at the time of the institution of this action, prior hereto, and at all times subsequent thereto, and that many conferences have been held by and between them, through their attorneys, and many letters have passed between them relating to this subject. Many such meetings were held and much correspondence had before the commencement of this action, and many have been held and much correspondence had since that time. Some of these conferences and exchange of correspondence related to the preparation and filing of the complaint. The subject matter under discussion related to the drafting of and allegations to be contained in such complaint, as well as to the court in which it was to be filed. Later conferences were held and correspondence exchanged relating to the preparation and filing of briefs upon law questions presented in this court, as well as in the Circuit Court of Appeals. Each of the parties charged with collusion contending at all times that this court had jurisdiction, that the lease in question is valid and is a binding obligation upon the defendant City, as successor trustee.

Many months prior to the commencement of this action, and at a time when there was a difference of opinion between attorneys for the defendants City and The Indianapolis Gas Company as to the validity of such lease, the defendant, The Indianapolis Gas Company, tendered employment to Newton D. Baker, Esq., an eminent lawyer of Cleveland, Ohio, as special counsel to make an investigation as to its validity and render a legal opinion thereon.

He accepted such employment and rendered an opinion, as requested. Later, when the parties were unable to adjust their differences and arrive at an agreement, it was decided by The Indianapolis Gas Company and the plaintiff that a suit should be instituted. The common stockholders of that company, of course, had a vital interest in the question of the validity of the lease because, if the lease is valid, they are assured of a six per cent return upon their stock for many years. If, however, a foreclosure suit should have been begun, or if the lease is invalid, no such return is assured. It was natural, therefore, that the Gas Company should take an active interest in the litigation and attempt to guide it along the course that would be most advantageous to it and to its stockholders. This interest gave rise to the many conferences and to the correspondence between such company and plaintiff. Since Mr. Baker had already in-

vestigated the question of the validity of the lease it would seem natural and logical that he be employed to institute and maintain the suit, if his employment could be effected. Consistent with his life, his high idea of ethics and his duty as a lawyer, when employment was tendered by plaintiff, he refused to accept such employment until released by The Indianapolis Gas Company. It is not disclosed from the evidence that he obtained any information during his employment by such Gas Company which would be inimical to its interests and, therefore, he would be at liberty to accept employment by the plaintiff if released by it. This was regularly done on May 12, 1936, and this suit begun by his firm on June 8, 1936.

In the case of *Dickerman v. Northern Trust Co.*, 176 423 U. S. 181, 20 S. Ct. 311, 44 L. Ed. 423, it was said that collusion "implies the existence of fraud of some kind, the employment of fraudulent means or of lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defense that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one."

Before collusion can be said to exist, the evidence must establish some improper or fraudulent acts upon the part of the plaintiff and defendant, The Indianapolis Gas Company, knowingly and intentionally done for the purpose of conferring jurisdiction upon and maintaining this action in this court. No allegations of the complaint have been shown by the evidence to have been falsely or fraudulently made for jurisdictional purposes, and no acts or conduct of such parties, either before or since the institution of this action, can be so construed as to constitute collusion. The prior decision of the Circuit Court of Appeals holding that this court has jurisdiction is, therefore, the law of the case and is binding upon the court. *Chase National Bank, Trustee, etc. v. Citizens Gas Company, supra.*

In considering the question of the validity of the lease, it must be kept in mind at all times that such lease was entered into by and between a corporation on the one hand as lessor with broad general powers to contract and a quasi-public corporation on the other hand as lessee with limited powers, organized for a specific purpose, that  
424 of administering a public charitable trust, as its initial trustee, and for a limited and fixed term. The

plaintiff, as trustee for the bondholders, has such an interest in the lease as to give it authority to maintain this action and seek to uphold its validity. It is its position that the lease is valid and, as stated in oral argument, is enforceable against the City as successor trustee as against all of the property which it acquired from its predecessor trustee and the income to be derived from its operation.

It is the contention of plaintiff, in seeking a declaratory judgment that the lease is a binding obligation upon the defendant City and upon the property transferred to it by the Citizens Gas Company, first, that the defendant City exercised its option to take all the property of such Gas Company and discharge the obligations of such company to its stockholders and bondholders and that it had the right only to take all of such property, including the lease, or none, or, in the alternative if it had the right to take only a part of such property, which plaintiff denies, it affirmatively decided to take *all* of it and cannot afterwards change its mind; second, that the right of the defendant City to become trustee and administer the trust carried with it the obligation of accepting the property subject to all outstanding legal obligations created by its predecessor trustee and that the lease was one of such obligations; third, that there was an actual acceptance of the four instruments of conveyance by the defendant City which expressly provided that the transfer was made  
425 subject to all outstanding obligations and that by the acceptance of the assignment of the lease, as one of such four instruments and taking possession of the leased property, it became liable, by privity of estate, for the obligations under the lease; fourth, that the City is estopped by judgment (a) the order of the Public Service Commission in which the lease was approved is binding upon it, (b) the decree in the case of *Fishback v. Public Service Commission, et al.*, 193 Ind. 282, is an adjudication of the validity of the lease and is therefore binding upon the City, (c) the judgment in the case of *Williams v. Citizens Gas Company, et al.*, *supra*, is an adjudication of the validity of the lease and is binding upon the City; fifth, that the defendant City is estopped by its own conduct and precluded by its own laches from denying the validity of the lease; and, sixth, that the defendant City is liable under the indemnity agreement for all liabilities and obligations of the defendant, Citizens Gas Company. It is the contention of the defendant, The Indianapolis Gas

Company, that the lease is valid and is a binding obligation upon the defendant City as successor trustee and upon all the property transferred to it by the Citizens Gas Company, predecessor trustee, and now operated by the City. In general, the argument advanced by it to sustain its position is similar to that advanced by plaintiff. With reference to the right of the defendant City to take over the lease as a part of the trust estate, it asserts that the Act of the General Assembly, approved March 11, 1929, is ample authority. The defendant, Citizens Gas Company, in its answer and in its brief, "takes no position upon the issues between the City of Indianapolis and the plaintiff." That is to say, it takes no position with reference to the validity or invalidity of the lease but contents itself by asserting that it has fully performed its obligations and duties as original trustee, including all obligations and duties imposed under the lease, and that it is therefore, released from any further obligations or liability under the trust, including the lease, both as to the plaintiff and as to the defendant, The Indianapolis Gas Company.

On the other hand, it is the contention of the defendant City that, contrary to the contentions of plaintiff and defendant, The Indianapolis Gas Company, it did not assume the obligations of the lease in taking over the property of its trust, but that it specifically refused to assume such obligations and gave notice of such refusal both before and at the time of the transfer of the property by the Citizens Gas Company; that the right to administer the trust, as trustee, carried with it no obligation to accept a 99 year lease entered into by its predecessor trustee; that there was no legal acceptance by it of the assignment of the lease, but that on the contrary it was simply given the physical possession of such assignment along with the other three instruments, and that it delivered to the defendant, Citizens Gas Company, a written refusal to accept such lease at the same time as the transmittal of such assignment; that the defendant City is not estopped either by judgment or in equity from denying the validity of the lease, and that there is no liability under the indemnity agreement as to the obligations and liabilities, if any, created by the lease.

At the time of the execution of the first instrument looking to the creation of the trust in 1905, that is, the franchise, the Citizens Gas Company was not yet in existence. It came into being the following year, and its



very existence was brought about by the necessity of providing a corporation to administer the trust for a period not longer than twenty-five years, pursuant to the mandate contained in the franchise granted by the City through its public officials the preceding year. In order that funds might be available for the carrying out of the plan contained in the franchise, it became necessary to sell stock in the corporation. This was done, stock was sold and funds were subscribed and paid by the public, which funds were used to purchase the property and plant of the Consumers Gas Trust Company which was winding up its business and, thus, this property became the original trust res. Pursuant to authority vested in it by its franchise, Articles of Incorporation, By-Laws, etc., the Citizens Gas Company began operation and began supplying the citizens of Indianapolis with gas through its system of mains, etc. As its customers increased, it became necessary that it extend its mains, and this necessarily meant that it was compelled to acquire additional pipes, connections, machinery, etc. It was the intent and purpose of the citizens who originated the idea of the formation of the trust and of the City through its Board of Public Works which granted the franchise that competition be had for The Indianapolis Gas Company which was operating and supplying gas to the citizens of Indianapolis at that time and thus be enabled to supply gas to such citizens at a cheaper rate. After the 428 two companies had operated for several years it was deemed advisable by the Citizens Gas Company and thought by it to be to the best interests of the gas users of Indianapolis that one company only be permitted to supply their needs in that direction. Consequently, negotiations were begun which consummated in the execution of the lease in question, and from that time on the Citizens Gas Company operated the property of The Indianapolis Gas Company in conjunction with its own until transferred to the City. At the time the property of the Citizens Gas Company, as trustee, was thus transferred, it was the contention of the City that the lease was not a part and parcel of such property, and it therefore declined to accept it as such. This it had a legal right to do, pending the adjudication of that question. The fact that it and plaintiff do not agree as to such lease being a part of the trust res and therefore binding upon the City, does not mean that, because it exercised its right to take over the trust, the City must take over the lease as a part



thereof before the question of its validity is adjudicated. It simply means that the question of whether or not such lease is a part of the res is yet to be determined and that the City was acting within its rights in asserting its position and declining to thus accept it at the time of its attempted assignment. The authorities cited by plaintiff to the effect that a trustee cannot take over a part of the assets of a trust and refuse others have no application 429 because it had not yet been determined that the lease is a part of such assets at the time the City exercised its rights to take over the property and hence at that time could not be said legally to be a part of such assets. If it is finally determined that the lease is valid it then, of course, becomes a part of the trust res and the City, as trustee, must accept it and be bound by its terms in the administration of its trust. If, on the other hand, the lease is held to be invalid, it is no part of the trust res and the City is not obligated by its terms. Until the time of the final determination of the validity of the lease, the City, as trustee, is acting within its rights in carrying out the contract entered into by and between defendant, The Indianapolis Gas Company, and itself and by depositing the money provided by that contract with the escrow agent, and no inference as to the validity or invalidity of the lease can be drawn therefrom. There is no evidence that the City did intend to take over such lease at the time it exercised its right to take over the property, but on the contrary all of the evidence is to the effect that it did not so intend, and that it had so notified the Citizens Gas Company a considerable length of time in advance of the transfer of the property and served a written rejection on it at the time of the transmittal of the instruments of conveyance. As a matter of fact, the defendant, The Indianapolis Gas Company, knew of the attitude of the City with reference to the validity of the lease and of its intention to reject it several weeks in advance of the transfer of the property and, by agreement with it, operation was continued as theretofore pending an adjustment or adjudication. While no legal obligation de- 430 volved upon the City to notify plaintiff in advance of its taking over the trust of its attitude with respect to the validity of the lease, yet it would seem that no effort was made by either it or the defendant, The Indianapolis Gas Company, to conceal its attitude in that respect. Within ten days following the transfer of the property to the City, an inquiry went forward from

plaintiff addressed to defendant, The Indianapolis Gas Company, concerning this matter, in which it was stated that it was "receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District is attempting to abrogate the lease made by your company with the Citizens Gas Company in 1913."

There were prepared and executed by the Citizens Gas Company four instruments which covered all of the property owned and operated by it, as trustee. One of these instruments of conveyance was the assignment of the lease. All of these instruments were physically transmitted by a representative of such Gas Company to a representative of the defendant City. However, at the same time and as a part of the same transaction, there was delivered by the defendant City to such representative of the Gas Company a written rejection of the lease. In fact, the Citizens Gas Company knew at the time of the execution and transmittal of such assignment that it would be rejected by the City. It was, no doubt, attempting to protect itself insofar as it could against any liability being asserted against it as lessee in such lease because of any failure upon its part to discharge its duty. It

cannot be said as a matter of law under the evidence  
431 that because there was physically delivered to the

City the written assignment of the lease and that it was actually recorded in the Recorder's Office, it was in legal effect an acceptance of the lease on the part of the defendant City. In reality the transaction constituted simply a tender on the part of the Citizens Gas Company of an assignment of the lease and a rejection of such assignment on the part of the City. No legal conclusions or inferences tending to bind the City by such transaction can be drawn therefrom.

As a part of the transaction when the property of the Citizens Gas Company was transferred to the defendant City, as trustee, on September 9, 1935, there was executed by the City and delivered to such Gas Company an Indemnity Agreement wherein, "in consideration of the . . . conveyance, transfer and assignment as aforesaid, it is agreed by the City . . . that it will hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company . . . from any and all loss, damage, costs, charges, liabilities or expense on account of any pending actions or suits which have heretofore been instituted against said Company and on account

of any actions or suits which may hereafter be brought against said Company, arising from any and all acts or actions or omissions to act on the part of said Company of any nature whatsoever." A careful reading and study of this agreement will disclose the fact that it was given solely for the purpose of indemnifying the Gas Company against any loss or liability which it might sustain because of any actions then pending or thereafter brought against it. It executed and transmitted to the defendant City an assignment of the lease along with all other instruments of conveyance and therefore performed its duty in that regard insofar as it was possible for it to do so. No judgment has yet been rendered against the Gas Company as to any liability under the lease, therefore no liability as yet arises against the City under such agreement, and such Company has not yet sustained any loss as contemplated by such agreement unless it be the cost and expenses incurred in the defense of this action, which are doubtless covered by such agreement. The acts of the City in the execution of this agreement cannot be construed so as to require it to carry out the terms of the lease. In construing this instrument, effect must be given to the acts and intentions of the parties at the time of its execution, as well as to the language of the agreement. Such acts and intentions, as well as the language of the agreement, are all contrary to the contention of plaintiff as to the effect of its execution.

The Shively-Spencer Public Utility Act was in effect at the time of the execution of the lease in question on September 30, 1913. It therefore became necessary to have such lease approved by the Public Service Commission before it could become effective. This approval was given upon a joint petition of the defendants, The Indianapolis Gas Company, as lessor, and the Citizens Gas Company, as lessee. One of the stockholders of the Citizens Gas Company and a citizen of Indianapolis, Frank S. Fishback, intervened in the proceeding before the Public Service Commission and sought to prevent the approval of the lease by that body. In this he failed, and a petition for a rehearing was denied. Having thus failed in his attempts before the Public Service Commission to prevent the approval of the lease, Fishback instituted an action in the Superior Court of Marion County wherein he sought to have vacated and set aside the order of the Commission in thus approving it. Defendants to this action were the Public Service Commission of Indi-

ana, The Indianapolis Gas Company, Citizens Gas Company, and The City of Indianapolis. It was his contention among others in that suit that the rentals fixed under the lease were excessive and their payment would result in the Citizens Gas Company's being unable to pay its stockholders dividends as required; that such Gas Company was without power to execute the lease without the consent of the owners of three-fourths in amount of its capital stock; that the City of Indianapolis had not given its consent to its execution; that the order of the Commission was contrary to the law and the evidence; that the provisions in the lease requiring the Citizens Gas Company to pay interest upon the bonds and dividends upon the stock of The Indianapolis Gas Company constituted an impairment of the contract between the Citizens Gas Company and himself and other stockholders for the payment of a fixed dividend to them, etc. Many other contentions were contained in the complaint, but the aforementioned are the essential ones. The defendant City

filed an answer in general denial, but all other defendants filed demurrers. The separate and several demurrers of defendants were sustained and, plaintiff refusing to plead further, judgment was rendered against him. Prior to the entry of final judgment, however, the suit was dismissed as to the City on motion of plaintiff, and it was not a party to the final judgment. An appeal to the Supreme Court of Indiana was attempted, but not having been perfected within time, it was dismissed by the Supreme Court. *See Back v. Public Service Commission, et al., supra.*

On May 12, 1930, one Allen G. Williams, a resident and citizen of Indianapolis, commenced an action in a Superior Court of Marion County against the Citizens Gas Company, The Indianapolis Gas Company, the City of Indianapolis, the Trustees under the Mortgage of The Indianapolis Gas Company, the Mayor, City Clerk, Board of Public Works, Board of Trustees and Directors for the Department of Utilities of Indianapolis, and the Public Service Commission. This was intended as a class suit by plaintiff, as it was alleged by him to be on behalf of himself and all other persons similarly situated. The nature of the suit, as stated in the opinion of the Supreme Court, was: "Suit by appellant (Williams) to establish a trust; to quiet title to property of the trust estate; to recover diverted assets of the trust estate; to recapture the trust and its property from delinquent

and insolvent trustees and sequester the same with receiverships; to administer the trust during an emergency and at the end of the emergency turn over the trust and its property to its lawful beneficiaries." To the 435 complaint in the Superior Court certain defendants filed a motion to strike out certain parts of the complaint, which motion was sustained in part and overruled in part. Afterwards, all defendants filed separate demurrers to the complaint, which were sustained, judgment rendered against the plaintiff, and he appealed to the Supreme Court of Indiana. The errors relied upon were (1) the action of the trial court in sustaining a motion to strike out certain allegations of the complaint, and (2) the sustaining of a demurrer to the complaint. The case was affirmed. *Williams v. Citizens Gas Company, et al., supra.*

It is the contention of plaintiff that the decision of the Public Service Commission in approving the lease is conclusive upon the parties before it, and that it cannot be collaterally attacked; that the City was a party to such proceeding and is, therefore, bound by its decision. It is its further contention that the question of the validity of the lease was adjudicated in both the case of *Fishback v. Public Service Commission, et al., supra*, and the case of *Williams v. Citizens Gas Company, et al., supra*; that these cases are *res adjudicata* of that subject and that, therefore, there is in this case an estoppel by judgment. On the other hand, it is the contention of the defendant City that "the judgments in the Fishback \* \* \* and Williams cases are not *res adjudicata* of the enforceability against the City of the lease" and that it is not precluded by the action of the Public Service Commission in litigating the validity of the lease in this action.

In the case of *Todd v. Citizens Gas Company, et al., supra*, the question of the validity of the lease was not in issue and was not adjudicated. Neither were the parties the same. Neither the plaintiff in this action nor The Indianapolis Gas Company was a party in that case. In that case, for the first time, the question of whether or not there was created, in 1905 and 1906, by the 436 franchise and other instruments then executed, a public charitable trust of which the Citizens Gas Company was the original trustee was presented and adjudicated.

In the proceeding before the Public Service Commission in 1913 in which the lease was approved, the defendant



City was not a party as trustee of a public charitable trust. It was not a party to the lease in any capacity and was simply representing the public interest in its appearance before the Commission. The Acts of the Public Service Commission were administrative in character, and not judicial. *Fishback v. Public Service Commission, et al., supra.* It is the law, however, that an order of the Commission based upon facts and while acting within its jurisdiction cannot be collaterally attacked in a court proceeding. *Public Service Commission, et al. v. City of Indianapolis, et al.,* 193 Ind. 37. The instant case is not, however, a collateral attack, because that order cannot, upon the facts before the Commission, be said to have determined the rights of the defendant City, as trustee of a public charitable trust. It did not assume the duties of its trust for almost twenty-two years thereafter, and the term of the lease extends for a period of more than seventy-seven years beyond the time when it did assume such duties. The legal questions as to the validity of the lease presented in this case were foreign to the proceedings before the Commission and, in fact, as a matter of law, such legal questions could not have been determined by it. In its administrative acts it looks to the public interest and cannot adjudicate private rights of persons not parties to a proceeding. Neither the plaintiff in this action nor any person representing the bondholders nor any of the bondholders was a party to such proceeding, and since it is admitted by plaintiff that the consideration contained in the lease must be paid by the defendant City, as trustee, from the proceeds of the trust or from income derived therefrom, the City, as trustee of such trust, was not a party. See—*In re Northwestern Indiana Telephone Company, et al.,* 201 Ind. 667. It will, therefore, be seen that the order of the Public Service Commission does not constitute an adjudication of the validity of the lease so as to bind the defendant City, as trustee, in this action.

In the case of *Fishback v. Public Service Commission, et al., supra*, the judgment was rendered upon demurrer being sustained to the complaint. In that action, it is true, that the City of Indianapolis was a party defendant in the Superior Court. It was a party, however, in its individual capacity, and not as trustee of a public charitable trust. In considering the question of *res adjudicata* or estoppel by judgment as pertains to that case, it must also be kept in mind that, even though the City filed an

answer in general denial, no issue of fact as between Fishback and the City was ever determined, the case having been dismissed by him as to the City before the rendition of a final judgment. Furthermore, neither the plaintiff in this action nor any trustee for the bondholders, nor any individual bondholder was a party to that action and, hence, was not a party to the final judgment. Even though a public charitable trust did, in law, exist at the time of entry of the judgment in the Fishback case, no such contention was made by him or any other party to that action, that subject never having been presented, until six years later, when it was asserted in the Todd case.

438 In the case of *Williams v. Citizens Gas Company, et al., supra*, the judgment was, also, rendered upon demurrer being sustained to the complaint. At the time of the commencement of that action, at the time of the final judgment in the Superior Court, and at the time of the decision of the Supreme Court of Indiana affirming the trial court, the defendant City was not the trustee and it did not assume such duties until many months thereafter. The question of the enforceability of the lease as against the City, as trustee, was not in issue in that suit. The question of whether or not the length of the term of the lease was such as to make it unenforceable as against the City, as successor trustee, was not adjudicated in that action and could not have been adjudicated therein because the City had not yet succeeded the Citizens Gas Company, as trustee. It is a fact that the question as to there being in existence a public charitable trust had been previously adjudicated but the provision in the lease with respect to the length of the term thereby created, hereinafter referred to, was not construed in that case, the court saying that "• • • • "The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the Commission in approving the same." The questions presented in that case and which were pertinent under the issues were entirely different and were surrounded with an entirely different set of facts from those presented in this case. Only the facts well pleaded in the complaint were before the court in that case.

439 It seems that a final judgment rendered sustaining a demurrer to a complaint may be relied upon as *res adjudicata* or estoppel by judgment upon the facts therein well pleaded, the same as though there had been



a final judgment rendered upon the merits sustaining the same facts. By the filing of a demurrer, all facts well pleaded are admitted. As was said by the Supreme Court of the United States in the case of *Gould v. Evansville, et al.*, 91 U. S. 526; 23 L. Ed. 416: "Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law, that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even by way of a demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury. \* \* \* \* *Aurora City v. West*, 7 Wall. 99." See, *Bissel v. Spring Valley Township*, 124 U. S. 225, 8 S. Ct. 495, 31 L. Ed. 411. *Northern Pacific Railway Company v. Slaght*, 27 S. Ct. 442. Gould on Pleading, Sec. 42. *Stuck v. Town of Beech Grove*, 201 Ind. 66, 163 N. E. 483. In considering the doctrine of *res adjudicata* or estoppel by judgment, it is said in the case of *Burrell v. Jean*, 196 Ind. 187, 146 N. E. 754, at page 759, that "In these considerations, it is important to remember that 'The party who invokes the doctrine of former adjudication must be one who tendered to the other an issue to 440 which the latter could have demurred or pleaded.' In other words, 'Ordinarily, four things must occur before the principles of *res adjudicata* can be invoked; (1) A suit. (2) A Final Judgment. (3) Identity of Subject Matter. (4) Identity of Parties. *Jones v. Vert*, 121 Ind. 140, 22 N. E. 882, 16 Am. St. Rep. 379. Another rule, and one which is said to be the best test for determining whether a former judgment is a bar to a present action, is; Will the same identical evidence support the issue tendered in both actions. Freeman on Judgments (4th Ed.) 259." In the case of *Whitsell, et al. v. Strickler, et al.*, 167 Ind. 602, 78 N. E. 845, the court said, "\* \* \* \* stated more generally, when two or more defendants make issues with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by a proper pleading." Again, in the case of *Wiltrout v. Showers*, 118 N. W. 1080, the Supreme Court of the State of Nebraska said: "The rule of law is well settled that parties to a judgment are not bound by it in a subsequent

action, unless they were adverse parties in the original action. The bar of former adjudication can only be raised between those who were adverse parties in the former suit, and the judgment in the former suit settles nothing as to the relative rights or liability of co-defendants 441 as between themselves unless their conflicting claims were put in issue by cross petition or adverse answers and were actually litigated and adjudicated." Furthermore, the defendant City was not a party to any of the proceedings which plaintiff contends constitute an estoppel in its capacity as trustee of a public charitable trust, and, therefore, any judgment rendered in either of such proceedings is not binding upon it in such capacity. As was said by the Supreme Court of Indiana, in the case of *Lord, et al v. Wilcox*, 99 Ind. 491, "As a general rule, judgments conclude the parties only in the character in which they sue or are sued." See, also, *Craighead v. Dalton*, 105 Ind. 72; *Erwin v. Garner*, 108 Ind. 488; *Bumb v. Gard*, 107 Ind. 575; *McBurnie v. Seaton*, 111 Ind. 56; *Jones v. Vest*, *supra*. The Indiana Appellate Court, in the case of *Copeland v. Brunning*, 44 Ind. App. 405, said, "It is the settled law that parties to a judicial proceeding are bound by the decision and judgment in such proceeding, in the capacity and right in which they appear, and not otherwise." Bigelow on Estoppel, 65. Applying these principles to the cases of *Fishback v. Public Service Commission, et al.*, *supra*, and *Williams v. Citizens Gas Company, et al.*, *supra*, neither is *res adjudicata* in this action, nor do the judgments in those cases constitute an estoppel. There was a suit and a final judgment in each case, but the identity of the parties was not the same, and neither was the identity of the subject matter the same, nor was the City a party to either in its fiduciary capacity. The facts were essentially different and were 442 only those pleaded in the complaints. In the Fishback case, the defendant City was not even a party to the final judgment, and in the Williams case neither was the subject-matter the same as between plaintiff and defendant City, nor was any issue tendered by the plaintiff in this action, the party seeking to invoke the doctrine of former adjudication, to the defendant City in this action in any capacity, the party against whom the doctrine is sought to be invoked, as pertaining to the validity of the lease or any other subject. Neither did the defendant, The Indianapolis Gas Company, tender any issue as to the validity of the lease to the defendant City.

Neither is the position taken by the City in the proceedings before the Public Service Commission, *supra*, the case of *Fishback v. Public Service Commission, et al.*, *supra*, the case of *Todd v. Citizens Gas Company, et al.*, *supra*, nor the case of *Williams v. Citizens Gas Company, et al.*, *supra*, as shown by the records and briefs, sufficient to constitute an estoppel.

It is the further contention of plaintiff that the defendant City, because of its acts and conduct extending over a period of years following the execution of the lease, is estopped from denying its validity, and that it is guilty of laches. Under the law, before the doctrine of estoppel can be invoked, the person seeking to invoke it must have been influenced by the acts and representations made by the party against whom such doctrine is sought to be invoked, and must have actually relied upon such acts and representations. These are questions of factual proof of which plaintiff in this action has the burden of 443 establishing. It was, also, said by the Supreme Court of Indiana in the case of *Horford v. Johnson, et al.*, 74 Ind. 480, that the following elements are necessarily present to support a decree of estoppel, (1) a representation or concealment of a material fact, (2) the representation must have been made with knowledge of the facts upon the part of the one making such representation, (3) the party to whom the representation was made must have been ignorant or uninformed as to its truthfulness, (4) the representation must have been made with the intent and purpose of influencing the other party to act upon it, and (5) the other party must have acted upon such representation so made. See—*Simpson, et al. v. Pearson, Admr.*, 31 Ind. 1. *McCabe, et al. v. Raney*, 32 Ind. 309. *Ross, et al. v. Banta*, 140 Ind. 120. In considering the question of estoppel, consideration must be given to the capacity in which the defendant City was acting at the time of the commission of the acts which are asserted by the plaintiff to have constituted estoppel. It must be kept in mind that the defendant City did not become trustee and take over the administration of its trust until September 9, 1935. Any of its acts prior to that time were done by it in its individual capacity and not in its fiduciary capacity. At the time of the approval of the lease by the Public Service Commission, the City was acting only in the public interest and not in any sense in its capacity as trustee of a public charitable trust. In fact, as heretofore stated, it was not adjudicated that such a

trust did exist for approximately seventeen years thereafter. At least two of the stockholders of the Citizens Gas Company at that time denied the existence of such a trust—Todd and Cotter. By the very term of the franchise, the City had twenty-five years from its grant 444 to exercise its rights and take over the property of the Citizens Gas Company. It proceeded to exercise such right within that period. Prior to the time of its actual taking over of the property, it exercised no control and could not exercise any control over it, and had no means of controlling the actions of the Citizens Gas Company. It is true that more than \$2,000,000.00 of principal amount of bonds were issued by the defendant, The Indianapolis Gas Company and sold to the public subsequent to the execution of the lease. It may also be observed that these bonds were authenticated by the trustee for the bondholders, and there is no evidence which justifies the conclusion that such trustee relied upon the lease as security for the payment of such bonds at that time. The money represented by these bonds was used for the benefit of The Indianapolis Gas Company and naturally increased the value of its property and the value of the security of the bondholders. Specific provision for the issuance of these bonds was made in the Trust Indenture. As a matter of fact, at the time of their authentication the lease itself was in the possession of The Indianapolis Gas Company. It is true that certain representations as to the lease were made by brokers who purchased this bond issue and by those who purchased the Indianapolis Gas Plant Revenue Bonds issued by the City just prior to the taking over of the property by it as trustee, but these representations were made by the purchasers of the bonds and not by the City, and the evidence fails to disclose that 445 such representations were authorized by it. In fact, under the evidence, such representations were not so authorized. Furthermore, the evidence fails to disclose that any present owner of any of the bonds issued by the Gas Company after the execution of the lease even knew of such representations at the time of his or its purchase and, therefore, it necessarily follows that no reliance could have been had thereon. Such purchaser was not in any manner induced to purchase such bonds because of any representation made even by the broker. Even though considerable length of time elapsed between the date of the execution of the lease and the taking over of the property by the City as trustee, and during all of

such time the City knew of its existence and terms, it cannot be said that any of its acts during that time, as a municipal corporation, were such as to estop it, as trustee, from denying the validity of the lease. See—*Texas and Pacific Railway Company v. Pattorff*, 291 U. S. 245; 54 S. Ct. 416; 78 L. Ed. 777; *California National Bank v. Kennedy*, 167 U. S. 362; 17 S. Ct. 831; 42 L. Ed. 198. It exercised its rights within the time prescribed by the franchise and prior to the exercise of such right and at the time of taking over of the property it gave notice and took every step possible within its power to inform all interested parties, and the world in general, as to its attitude upon the question of the validity of the lease. Notice was given and public record made of such attitude. The evidence is insufficient to justify the conclusion that the defendant City is estopped by its acts and conduct from denying the invalidity of the lease.

446 It is the contention of the defendant City that the lease was executed in violation of Sections 48-1507 and 48-7302, Burns' Revised Statutes of Indiana (1933) and that it is, therefore, invalid. Section 48-1507 provides in substance that "No executive department, officer or employee thereof shall have power to bind such City to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department \* \* \* ; and all contracts and agreements, express or implied, and all obligations of any kind and every sort, beyond such existing appropriations are declared to be absolutely void; Provided, that the Board of Public Works shall have power to contract with any individual or corporation for \* \* \* supplying the City with gas \* \* \* , on such terms and for such times not exceeding the term fixed by Sec. 254 (Sec. 48-7302) of this Act as may be agreed upon; but any such contract shall be submitted to the common council of such City and approved by ordinance before the same shall take effect \* \* \* ." Section 48-7302 referred to above limits the time to a "term not longer than twenty-five (25) years." The lease was not an agreement by The Indianapolis Gas Company to furnish gas to the citizens of Indianapolis but, on the contrary, it ceased furnishing gas to them upon its execution. It was simply a contract by it with another corporation to permit such other corporation to use its property for a definite time upon payment to it of a definite



and fixed consideration. Furthermore, no appropriate  
447 tion under this statute is necessary, because it was  
admitted by plaintiff, on oral argument, that it does not  
contend the payment of the rental, or any part thereof,  
can be enforced from the general fund of the City or from  
any other fund than the income derived from the operation  
of the trust and from such trust property. It is,  
therefore, apparent that neither of these sections of the  
statute has any application to the facts in this case.

At the time of the execution of the lease there seemed  
to be a doubt in the minds of the parties thereto as to  
their power to enter into it for such a long period of time.  
The express term being for a period of ninety-nine years.  
That there was such a doubt may be inferred from the  
provisions of subsection 32 of the lease, as follows:  
" \* \* \* In the event it should be determined by a court  
of final jurisdiction that the contract is ultra vires or  
void because of the length of the term created, and that  
such term is in excess of the authority of either party  
hereto to contract, then this lease shall nevertheless be  
binding upon the parties hereto for the longest term for  
which the parties hereto might lawfully contract." The  
parties to the lease were the defendants, The Indianapolis  
Gas Company and the Citizens Gas Company. The defendant,  
Citizens Gas Company, complied with its term so long as it  
operated the property and by its transfer of all its property,  
as provided in the franchise and its Articles of Incorporation,  
and its attempted assignment of the lease, it is released from  
any further obligations.

In order that a logical conclusion may be reached as to  
the validity of the lease, an examination of the franchise,  
Articles of Incorporation, Amended Articles and By-Laws  
of the Citizens Gas Company is necessary to ascertain whether  
or not such instruments contain any provisions granting such  
authority. These are the instruments which created the trust,  
and, if no authority for the execution of the lease or a lease  
of that character can be found  
448 within them, then, no such authority exists. Before the  
franchise became effective it was necessary that it have the  
approval of the Common Council of the City. The granting and  
approval of the franchise were the initial steps in the creation  
of the trust. One of the most important powers with which a  
corporation can be clothed is the authority to enter into a lease  
whereby it assumes obligations for the payment of vast sums of  
money annually as rental over a long period of years. It

is natural to conclude, therefore, that where the defendant City deemed it advisable to grant a franchise to three of its citizens expressly providing therein for the assignment of such franchise to a corporation to be thereafter organized for the express purpose of serving as the initial trustee of a public charitable trust, if it had intended to confer such an important power upon such corporation Trustee, it would have done so in language which could not have been misunderstood. It must be remembered that where a franchise is granted by a municipal corporation to an individual or a corporation and the extent of the grant contained in such franchise becomes the subject of construction, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the municipality. In all grants by the public, the principle is well recognized that nothing passes by implication. As was said by the Supreme Court of the United States, in the case of *Piedmont Power & Light Company v. Town of Graham, et al.*, 253 U. S. 193; 40 S. Ct. 453; 64 L. Ed. 855: "Grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocally granted is withheld,—nothing passes by implication." See—*Knoxville Water Co. v. Knoxville*, 200 U. S. 22; 26 S. Ct. 224; 50 L. Ed. 355; *Blair v. Chicago*, 201 U. S. 400; 26 S. Ct. 427; 50 L. Ed. 801; *Mitchell v. Dakota Central Telephone Co.*, 246 U. S. 396; 38 S. Ct. 362; 62 L. Ed. 793.

Obviously, it was the intent and purpose of the defendant City, in granting the franchise, and of the incorporators of the defendant, Citizens Gas Company, to create a quasi public corporation for the express purpose of administering a Public Charitable Trust. The defendant, Citizens Gas Company, obtained all its rights and powers through the franchise. Its Articles of Incorporation, Amended Articles and By-Laws were all so framed as to carry out the duties and responsibilities imposed upon it by such franchise. The franchise provided a method by which the object of the corporation was to be obtained. It safeguarded the interests of the stockholders of the corporation to be thereafter organized, who were the settlers of the trust, by providing for the return to them of the money invested by them, together with interest thereon at the rate of ten per cent per annum. It also imposed upon the Directors of the Citizens Gas Company the absolute duty of conveying to the City all its property when it had discharged its obligations to its stockholders,



which, according to its express terms, was to be within twenty-five years from its date. The franchise further provided that no obligation could be created by the Citizens Gas Company for the purpose of reimbursing its own stockholders which would extend for a longer period than ten years beyond the termination of such franchise. (*Todd v. Citizens Gas Company, et al., supra.*) Furthermore, the instruments creating the trust contained detailed instructions upon such subjects as the retirement of the stock of the Citizens Gas Company, *the order in which its earnings should be used*, the payment of the bonds, the time within which the City was to exercise its right to take over the property, etc., yet, not one word is to be found with reference to the execution of a lease which, by its terms, would bind the trust far beyond the time within which the lessee, Citizens Gas Company, was to surrender title and possession of such trust; far beyond the corporate life of both the Citizens Gas Company and The Indianapolis Gas Company and would anticipate for a period of ninety-nine years a supposed profit on behalf of the Citizens Gas Company sufficient to pay five per cent interest on \$4,833,000 of the mortgage bonds of The Indianapolis Gas Company issued and outstanding at the time of the execution of the lease and upon all bonds thereafter issued by it, and on all its refunding bonds, on all its escrow bonds, and in addition thereto, the sum of \$120,000 per annum as dividends on the capital stock of The Indianapolis Gas Company, and taxes of all description for which The Indianapolis Gas Company is liable. It is inconceivable that the settlors of the trust, the City, the grantees of the franchise, and the incorporators of the Citizens Gas Company intended to provide for the protection of stockholders of another corporation, in this instance, The Indianapolis Gas Company, through the medium of a long term lease whereby such stockholders would be assured of a return of six per cent per annum upon the par value of the common stock held by them for a period of ninety-nine years, while the stockholders of the corporation organized to administer the trust (Citizens Gas Company) would receive nothing upon their investment unless and until such The Indianapolis Gas Company stockholders had been paid their six per cent dividends and interest on the bonds and taxes paid, even though the instruments creating the trust specifically provided for the payment of ten per cent per annum to the stockholders of the Citizens Gas Company. Rather, it was

their intention to protect the stockholders of the Citizens Gas Company who made possible the creation of the trust and assure them a return of their money, together with interest thereon at the rate of ten per cent per annum, and ample provision is made therefor in the franchise, etc. No provisions are to be found in the trust indentures which would authorize or empower the trustee of the Public Charitable Trust, created by such trust indenture, to enter into a contract which would, of necessity, anticipate sufficient profits on the part of the trustee over a period of ninety-nine years necessary to pay the rental provided in the lease in question, which amounts to more than \$500,000.00 per year. (*Oregon Railway & Navigation Company v. Oregonian Railway Company, Limited*, 130 U. S. 1; 9 S. Ct. 409; 32 L. Ed. 837.) No authority can be found in the instruments creating the trust for the execution of the lease in question. Therefore, such lease, executed as it was without such authority, is ultra vires and void, and is not binding upon the defendant City. It is no part of the trust res. To hold otherwise would be to read into the trust instruments authority not therein contained.

451 At the time of the commencement of this action, no interest was due upon the bonds of The Indianapolis Gas Company secured by the mortgage of which plaintiff is the sole trustee. Attached to each of these bonds were coupons evidencing the amount of interest due each six months. The coupons last paid were those which fell due on April 1, 1936, and none has been paid since that date. It is apparent that, at the time of the commencement of this action, plaintiff was not entitled to judgment against any of the defendants for any sum of money because of default in the payment of interest, because none was then due. However, default was afterwards made in the payment of coupons due on October 1, 1936 and thereafter, and plaintiff is, therefore, entitled to a judgment against the defendant, The Indianapolis Gas Company, for the amount of such interest now in default. The defendant, The Indianapolis Gas Company, admits that interest in the total aggregate amount of \$1,032,150.00 was due and unpaid on April 1 of this year.

It is the contention of plaintiff that, since the various coupons evidencing the amount of interest due were not paid when due, it is entitled to interest upon the unpaid coupons at the rate of six per cent per annum from and after the date when such coupons became due. In other words, it is seeking to recover a judgment for interest

upon the past due and unpaid interest at the Indiana statutory rate in the absence of a contract, in addition to the aggregate amount of the interest due. (Burns' R. S. 1933, Sec. 19-2001). On the other hand, the defendant, The Indianapolis Gas Company, contends that there is a provision contained within the mortgage indenture and within the bonds themselves, wherein it is provided that no interest upon interest shall be paid, and that such provision controls.

It is provided in the mortgage that in case of default in the payment of interest when due, and in case of action being taken because of such default by the Trustee upon request of the bondholders, possession of the mortgaged property taken by the Trustee and sold by it pursuant to the provisions of such mortgage the proceeds shall be applied "• • • to the payment of interest on said bonds hereby secured in the order in which the installments of such interest shall have become due, but *without interest upon such interest* • • •." (Our italics.) It is clear, therefore, that if possession of the mortgaged property is taken by the Trustee and sold by it, and past due and unpaid interest, represented by coupons, upon the

bonds is paid from the proceeds of such sale no interest can be allowed or paid upon such interest coupons.

Upon examination of the bond to ascertain whether or not the aforementioned provisions of the mortgage apply in an action wherein a personal judgment is sought and not a sale of the property for the purpose of paying the past due interest coupons, we find the following provision, "In case of default in the payment of any half yearly installment of interest which shall become payable and which shall have been demanded by presentation at the office of said The Trust Company of America, and a continuance of such default for a period of six months after such demand, the principal of this bond shall become due, in the manner and with the effect and *subject to the conditions provided in the Indenture of Mortgage securing the payment of the same* • • •." (Our italics.)

In substance, the language thus found in the bond is the same as the first part of the paragraph of the Mortgage Indenture from which the above quotation is taken. While this is an acceleration clause, yet, in the institution of an action to collect the due interest and in acquiring a judgment in such action, it must be "subject to the conditions provided in the Indenture of Mortgage securing the payment of same" and one of such conditions is "without in-

terest upon such interest." There can be no valid reason for holding that such provision applies if the property of mortgagor is possessed and sold by the Trustee and the bondholder paid from the proceeds of such sale and that it does not apply where a personal judgment only is sought for the amount of the defaulted interest. In either event,

the bondholder receives the amount of the interest due, 454 which is all to which he is entitled under the bond.

Plaintiff is not entitled to a judgment which includes interest upon the interest, but is entitled to a judgment against the defendant, The Indianapolis Gas Company, for the aggregate amount of the past due and unpaid interest. In the cases cited by the plaintiff, and upon which it relies, there are to be found no such provisions and conditions as those found in the bonds and mortgage in this case, and such cases are, therefore, clearly distinguishable.

By virtue of the provisions of the franchise granted to Potts, *et al.*, by the defendant City in 1905, afterwards assigned to the defendant, Citizens Gas Company, and the Articles of Incorporation and By-Laws of such company, it became a quasi-public corporation and, as such, was the original trustee of the Public Charitable Trust created by such franchise, Articles of Incorporation and By-Laws. At the time of the execution of the lease in question, the defendant, The Indianapolis Gas Company, as a matter of law, was chargeable with knowledge of its status, as such. It was also chargeable with knowledge of the contents and provisions of such franchise, Articles of Incorporation and By-Laws, which fixed the duties and responsibilities of the Citizens Gas Company, as well as defined its powers and limited its authority. Acting upon the authority and mandate of the franchise, the defendant, Citizens Gas Company, was organized and began the execution of its trust. It performed its duties through its Board of Directors, Officers, and Voting Trustees, with fidelity, and carried out the original intent and purpose of the citizens of Indianapolis, as expressed in the franchise, its Articles of Incorporation and By-Laws. Under authority granted it by such franchise and its Articles of Incorporation and Amended Articles, the defendant, Citizens Gas Company, proceeded to wind up its affairs and, on September 9, 1935, transferred and conveyed all its property to the defendant City, as successor trustee. Having discharged its duties to its stockholders and bondholders, it became its duty to thus convey all its property

to the City. As a corporation, it profited nothing by  
455 such conveyance, but was simply performing its duty  
under its contract and was, in effect, carrying out the  
mandate of the Circuit Court of Appeals wherein it said,  
in speaking of the duty of the Board of Directors of the  
Citizens Gas Company, in the case of *Todd v. Citizens Gas  
Company, et al., supra*, "The limitations on the rights of  
stockholders and the duty of the directors to convey to the  
City were embodied in the charter of the corporation."  
It did everything within its power to perform the duties  
of its trust honestly and legitimately, and, having com-  
plied with all the terms and conditions of the franchise, its  
Articles of Incorporation and By-Laws, and having dis-  
charged, or caused to be discharged, its duties and obliga-  
tions to its stockholders and bondholders, as required  
by its contract, it is under no further obligation or lia-  
bility to any one in this action, and no judgment should  
be rendered against it.

Insofar as any liability of the defendant City, under  
the lease is concerned, that question was determined by the  
court when it held such lease to be invalid. Under the  
issues presented at this time for determination, the plain-  
tiff is entitled to no money judgment against the City.

A judgment will be entered in accordance with the views  
herein expressed.

---

456 (Entry for September 21, 1939, continued.)

and the Court pursuant to Rule 52 of the Rules of Civil  
Procedure, signs and files herein its special findings of  
fact and states its conclusions of law thereon, which said  
special findings of fact and conclusions of law are ordered  
by the Court filed and made a part of the record in this  
cause, all of which is now done.

Filed  
Sept. 21,  
1939.

457 IN THE DISTRICT COURT OF THE UNITED STATES.

\* \* (Caption—1844) \* \*

### SPECIAL FINDINGS OF FACT.

458 \* \* \* \*

Pursuant to Rule 52 of the Rules of Federal Procedure, the court now states its Special Findings of Fact upon the issues presented for determination, as follows:

#### 1.

That The Chase National Bank is a corporation established and existing under and by virtue of the banking laws of the United States with its principal place of business located in the City of New York in the State of New York and is engaged in and authorized to engage in a general banking and trust business. It is a resident and citizen of the State of New York, and is the sole trustee under a mortgage executed by the defendant, The Indianapolis Gas Company, on October 1, 1902 and, as such trustee, is the plaintiff in this action.

#### 2.

That each of the defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis, is a corporation duly created and existing under the laws of the State of Indiana with its principal place of business in the City of Indianapolis, State of Indiana, and is a citizen and resident of the State of Indiana.

#### 3.

That the City of Indianapolis is a municipal corporation existing under and by virtue of the laws of the State of Indiana and is located in the Southern United States Judicial District, Indianapolis Division.

#### 4.

That defendants, Thomas D. Sheerin, A. Dailas Hitz, Edward W. Harris and Charles Rauh, are members of the Board of Trustees for Utilities of the City, and each of



them is a citizen and resident of the City and of the State of Indiana.

5.

That defendants, Henry L. Dithmer, Brodehurst Elsey, Roy Sahn, Donald J. Angus, Isaac E. Woodard, 459 LeRoy J. Keach, and John E. Ohleyer are members of the Board of Directors for Utilities of the City, and each of them is a citizen and resident of the City and of the State of Indiana.

6.

That the amount in controversy in this cause, exclusive of interest and costs, exceeds the sum or value of \$3,000.00.

7.

That The Indianapolis Gas Company was incorporated under the general laws of Indiana prior to November 28, 1913, had for many years been engaged in operating a gas manufacturing plant and distributing system in the City of Indianapolis and in selling gas to the inhabitants thereof; that it continued the operation of said gas plant and system until November 28, 1913, when the same was delivered to Citizens Gas Company in accordance with the provisions of a ninety-nine year lease dated September 30, 1913, hereinafter referred to as "the lease."

8.

That on October 1, 1902, The Indianapolis Gas Company executed its mortgage deed of trust of which The Chase National Bank is successor and sole trustee; that a correct copy of said mortgage marked Exhibit A is attached to the bill of complaint in this cause and is by reference made a part of these findings; that said mortgage was given to secure the payment of principal and interest on bonds which were authorized to be issued in the total principal amount of \$7,500,000; that said mortgage was duly recorded; that the bonds issued under such mortgage were in the denomination of \$1,000 each, payable on October 1, 1952; that the mortgage covers the entire operating property of The Indianapolis Gas Company and contains provisions to secure the payment of such bonds and the ordinary covenants of a large corporate trust deed; and that



the mortgage contains an after-acquired property clause and in addition to covering the physical property covers the rents, issues, income, tolls, and profits arising therefrom.

Subdivision 14 of the mortgage contains the following provisions:

•        •        •        •        •  
“(Here follows the fifth grammatical paragraph of subdivision XIV of the Mortgage (Exhibit A to the bill of complaint, I R. 46, lines 13-36)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

460     That, pursuant to the provisions of Subdivision 14, supra, this action was begun by the Trustee, at the request of The Massachusetts Mutual Life Insurance Company and the New England Mutual Life Insurance Company, holders and owners of bonds in the principal amount of \$265,000.00 and \$150,000.00 respectively.

9.

That there are now issued and outstanding in the hands of the public, and were at the time of the commencement of this action, bonds of The Indianapolis Gas Company secured by the mortgage referred to in Findings of Fact No. 8 in the aggregate principal amount of \$6,881,000 (which includes \$120,000 and \$18,000 principal amounts, respectively, of such bonds held by The Indianapolis Gas Company and the City); that each of said bonds and the coupons attached thereto are in the form set forth in the mortgage, a copy of which, marked Exhibit “A,” is attached to the bill of complaint in this case and incorporated into these Findings by reference.

10.

That The Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company and Savings Bank of Baltimore are the owners and holders of the following amounts, respectively, of the bonds, referred to in Findings of Fact No. 9, together with all interest coupons due on October 1, 1936, and thereafter attached thereto, viz.: \$265,000, \$150,000 and \$163,000.

## 11.

That The Massachusetts Mutual Life Insurance Company purchased its bonds between March 13, 1925, and May, 1931. New England Mutual Life Insurance Company purchased its bonds between July 14, 1916, and August, 1931; Savings Bank of Baltimore purchased its bonds during the years 1924, 1925, 1927 and 1928.

## 12.

That there is no evidence in this case that Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company, Savings Bank of Baltimore, or any other owner or holder of the bonds referred to in Findings of Fact No. 9 other than defendant City purchased any of their bonds at any time subsequent to August, 1931, except those purchased by Citizens Gas Company in 1932; that there is no evidence in this case that any present owner of such bonds purchased his or its bonds relying on any acts done or representations made by Citizens Gas Company or the City or any of their authorized officers or agents.

## 13.

That the last coupons attached to the bonds referred to in Findings of Fact No. 9 which have been paid were those falling due April 1, 1936; that when that interest was paid coupons were presented for payment by and payment was made to more than 940 individual and 210 corporate bondholders.

## 14.

That Citizens Gas Company of Indianapolis was organized on the 23d day of May, 1906, under the general laws of the State of Indiana, providing for the incorporation of manufacturing and mining companies, its purposes and obligations being fixed and controlled entirely by its Original and Amended Articles of Incorporation, as amended, its By-Laws, and the certain franchise ordinance and contract granted and entered into on the 25th day of August, 1905, by and between the City of Indianapolis, acting by and through its Common Council, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt. Copies of said instruments and enactment as contained in the stip-

ulation of the parties offered in evidence as Plaintiffs' Exhibit One, are adopted by the court as part of these Findings of Fact.

## 15.

That, by virtue of such instruments and enactment, the Citizens Gas Company became the initial trustee of a public charitable trust for the benefit of the present and prospective gas consumers of the City of Indianapolis, and all of the rights, property and assets then or thereafter acquired by it were held by it as such initial trustee, and for the purposes and upon the terms and conditions set forth in said instruments and enactment, and no other.

## 16.

That the sole purpose and object of the creation, organization and existence of the Citizens Gas Company was to act and perform the duties of initial trustee of the said public charitable trust, as specifically set forth in the said instruments and enactment, and it had no power or authority, as a corporation, to act otherwise.

## 17.

That, as a result of such franchise, contract and other relevant trust instruments a public charitable trust was created; that the settlors, beneficiaries, trustees and trust res were as follows:

(a) The settlors were the public spirited citizens of Indianapolis who subscribed for stock of Citizens Gas Company;

(b) The beneficiaries of the trust were the then and future gas users of Indianapolis;

462 (c) The initial trustee was Citizens Gas Company with a definitely fixed and limited term of trusteeship, viz.: 25 years and as soon thereafter as the property of the trust could be conveyed to the successor trustee;

(d) The City was the successor and is the present trustee;

(e) The trust res was the property and plant of Citizens Gas Company, being the property formerly owned by the Consumers Gas Trust Company.

18.

That the franchise contract creating the public charitable trust referred to in the last preceding Finding requires the individual grantees to organize an Indiana corporation to which the franchise should be assigned and whose Articles of Incorporation should provide as follows:

(a) The capital stock to be not less than \$1,000,000 to be divided into shares of \$25 each;

(b) No increase of capital stock shall be made unless the new stock shall be sold at public auction;

(c) The Company shall make and publish a semi-annual public statement of its affairs and the City Controller shall have the right to examine its books and the City Engineer its plant and property;

(d) The entire capital stock shall be placed in the hands of five trustees, one of whom shall be nominated by the Mayor and the capital stock shall be voted as a unit in the selection of directors. Any vacancy occurring on the Board shall be filled by the remaining directors except if a vacancy is created in the case of the member of the Board appointed by the Mayor it shall be filled by him;

(e) The voting trustees shall issue to each subscriber to the capital stock a beneficial certificate which shall entitle him to receive dividends at a rate not exceeding ten per cent per annum;

(f) The earnings of the Company shall be used in the following order:

First. To the payment of maturing debts and operating expenses;

Second. To the payment of dividends at the rate of ten per cent per annum; and

Third. In providing for extensions and betterments ordered by the Board of Public Works.

Fourth. The excess to the payment in whole or part of the amounts subscribed for stock.

(g) The franchise provides

• • • • •  
“(Here follows paragraph 1(g) of the Franchise Contract of August 25, 1905 (part of Exhibit C to the bill of complaint, I R. 84, lines 13-26)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

463 (h) The business and prudential affairs are to be managed by a Board of nine Directors elected annually.

(i) Subdivision 2 of the franchise reads as follows:

• • • • •  
“(Here follows paragraph 1(i) of the Franchise Contract (part of Exhibit C to the bill, I R. 84-85)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

(j) The company to be organized shall secure, acquire or construct and put in operation a fuel gas plant with not less than 100 miles of mains within eighteen months from the sale of the Consumers Gas Trust Company mains then pending and failing therein shall forfeit all rights hereunder, provided that the Board of Public Works may at any time after the sale of the Consumers Gas Trust Company mains require the individual grantees or their assigns to file a bond in the penalty of \$25,000 conditioned for the performance of the contract and the acquisition or construction of such fuel gas plant;

(k) The grantees and their assigns are to hold the city harmless from any damages occasioned by the construction of mains and there are elaborate provisions covering the doing of work in the streets, the supervision of that work, the construction of mains and the quality of gas to be furnished;

464 (l) The grantees agreed never to charge the consumer in excess of sixty cents per 1,000 cubic feet of gas and it is provided that if the price exceeds sixty cents the franchise becomes void and the city shall have the right to acquire said plant as upon the termination of the franchise period;

(m) There are also elaborate provisions for extensions of gas lines upon order of the Board of Public Works, the installation of meters, the testing of meters, etc.;

(n) Subdivisions 21, 22, 23 and 24 of the franchise read as follows:

• • • • •  
“(Here follow subdivisions 21, 22, 23 and 24 of the Franchise Contract (part of Exhibit C to the bill, I R. 93-94)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

465

19.

That the Articles of Incorporation adopted by Citizens Gas Company contain the essential provisions required by the Franchise Contract. Subdivision 7 of such Articles reads as follows:

“Any member of the Board of Trustees may be removed

by the Marion Circuit Court upon the showing that said trustee is an employee or holder of any of the securities or capital stock of or delivering gas to consumer residing in, or in the vicinity of the city of Indianapolis, or for any corrupt practice or any misconduct which said court may deem detrimental to the interests of said company. Removal from the city of Indianapolis shall, ipso facto, vacate the office of any trustee."

## 20.

That there are no provisions in the franchise contract, the Articles of Incorporation of Citizens Gas Company, except as amended in 1921, or its by-laws authorizing the issuance of preferred stock or the execution of any mortgage, except that a mortgage shall be executed at the time of the transfer of the property to the City, if necessary, to pay the obligations and stock of such company. There is no provision in any of the trust instruments authorizing Citizens Gas Company to become the Lessee of a competing gas property.

## 21.

That, prior to September 30, 1913, and at all times subsequent thereto, all persons, including the plaintiffs herein, the defendant, The Indianapolis Gas Company, and all of the holders of the bonds of the said defendant, either had actual knowledge of, or were bound in law by knowledge of, all of the terms and provisions of the said instruments and enactment and of the purposes, objects, power and authority of Citizens Gas Company, as aforesaid, including the duty, power and authority of Citizens Gas Company, at the end of the period of said franchise ordinance, to-wit, on August 30, 1930, when the conditions fixed therein precedent to the conveyance and transfer had been fully complied with, to convey and transfer all of the said property to the City of Indianapolis, and thereafter to be wound up.

## 22.

That, on September 30, 1913, The Indianapolis Gas Company executed and delivered to Citizens Gas Company a certain written instrument of lease (hereafter called "Lease"); that a correct copy of said lease marked Exhibit "B" is attached to the bill of complaint in this case

and is by reference made a part of these Findings; that all the property leased by The Indianapolis Gas Company to Citizens Gas Company was covered by and included in the mortgage referred to in Findings of Fact No. 8, and that the trust res did not include any part of the property of The Indianapolis Gas Company or any lease on any part of such property.

## 23.

That the lease contains, among other things, the following provisions:

466 (a) The entire operating plant of The Indianapolis Gas Company is leased to Citizens Gas Company for a period of 99 years from the 1st day of October, 1913.

Subdivision 32 of the lease contains the following provision affecting the term:

"In event it should be determined by a court of final jurisdiction that the contract is ultra vires or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract."

(b) Subdivision 1 of the lease reads, in part, as follows:

. . . . .

"(Here follows all of the first paragraph of subdivision 1 of the Lease except the last sentence thereof (Exhibit B to the bill of complaint, I R. 55-56))."

(Inserted pursuant to stipulation filed November 22, 1939.)

(c) The right is given to the Lessee to sell worn or damaged property and to procure a release of such property from the lien of Indianapolis Gas mortgage;

(d) The rent provided for in the lease is the payment of \$120,000 a year, which amounts to six per cent dividends on the outstanding stock of Citizens Gas and, in addition, five per cent interest on all outstanding bonds.

When the lease was executed there were outstanding \$4,833,000 of bonds and at the present time there are outstanding \$6,881,000.

It is further provided that when the maximum price of gas to general consumers shall be fixed at a sum more than forty-five and not more than fifty cents per 1,000 cubic feet the rent shall be increased \$10,000 a year, and when such price of gas shall be fixed at a sum not more than forty-



five cents the increased annual rental shall be \$15,000 instead of \$10,000.

(e) Provision is made for the issuance of additional bonds to reimburse Lessee for expenditures made in betterments and extensions to the leased plant which can be drawn down by the Lessee to the extent of eighty-five (85%) per cent of sums so expended.

(f) The Lessee agrees to refund the mortgage debt during the entire period of the lease and if the bonds are sold at a discount to pay the Lessor the difference in cash and if sold at a premium to retain such premium.

(g) An inventory was made of the personal property and at the termination of the lease Lessee agrees to deliver to the Lessor usable merchandise of life value or to pay the Lessor in money the difference between the value of the property returned and the total value of the inventory.

(h) It is agreed that Lessee will do everything necessary to preserve its right to do business in the city. There then appears the following provision:

"That it will so far as the same may be necessary to that end, secure new franchises from time to time from the city of Indianapolis or other public authorities having power to grant such franchises to do business in the city of Indianapolis. That at or before the termination of the corporate life of the lessee, the lessee will so far as it is legally able so to do, either extend its corporate life or cause a new corporation to be formed to which it will transfer all its then property and assets and cause said new company expressly to assume all the obligations of this lease. And the like duty shall be assumed by all successive companies acquiring said property as such successors in title. All of which agreements however are expressly subject to the rights now held by the city of Indianapolis under the terms of the franchise granted to the lessee by said city."

(i) In addition to the agreed rental Lessee agrees to pay all taxes, general and special, ordinary and extraordinary, of every nature and description, not only upon the property but upon the rent reserved so far as such income constitutes the basis for an income tax.

(j) The provisions in respect of maintenance are as follows:

. . . . .

"(Here follows the first grammatical paragraph of subdivision 15 of the Lease (Exhibit B to the bill, I R. 64))."  
(Inserted pursuant to stipulation filed November 22, 1939.)

468 (k) The right of the Lessor to surrender its existing franchise and accept an indeterminate permit is not to be abridged by the execution of the lease.

(l) Lessee also covenants to insure the leased property but may provide protection against loss by fire by the establishment of an insurance fund.

(m) Lessee agrees to operate the plant leased and to perform all grants to Lessor or contracts by it with the state or any municipal subdivision.

(n) Subdivision 22 of the lease reads as follows:

• • • • •  
 “(Here follows subdivision 22 of the Lease (Exhibit B to the bill, I R. 72)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

(o) Upon approval of the lease by the Public Service Commission, Indianapolis Gas shall file a declaration of a surrender of its franchise and state therein that it desires to receive in lieu thereof by operation of law an indeterminate permit.

(p) That in valuations for rate-making purposes only property actually used and useful shall be included in the rate base and unnecessary duplications of plant shall not be included.

(q) The power to regulate rates remains in the Public Service Commission and while this lease is in force Citizens Gas Company will permit regulation by the Commission.

(r) Lessee binds itself to extend the mains of the  
 469 combined plants to the extent of at least three miles in any one year. In addition to these minimum requirements Lessee agrees to comply with any orders for extensions made by competent authority.

(s) A schedule of rates is set forth in the lease.

(t) There is a provision for arbitration of disputes.

## 24.

That on September 30, 1913, the property of The Indianapolis Gas Company included a plant for making and distributing gas to consumers in the City, and approximately 375 miles of mains located in the streets and alleys of the City, which mains were connected with meters of more than 41,000 customers who were served thereby. Citizens Gas Company at that time owned and operated

approximately 184 miles of mains and had 11,165 meters in use.

## 25.

That the City is not named as a party to such lease.

## 26.

That no ordinance or resolution was ever at any time adopted by the Common Council or the Board of Public Works of the City authorizing the execution of the lease or ratifying it, or agreeing to be bound by its terms.

## 27.

That no action has ever been taken at any time by the Boards of Trustees or Directors of the Department of Utilities of the City authorizing the acceptance of an assignment of said lease, ratifying the lease or agreeing to be bound by its terms.

## 28.

That the City took over the property of Citizens Gas Company on September 9, 1935, as successor trustee; that several days prior to said date the City advised Citizens Gas Company that it would decline to accept an assignment of the lease; that the written assignment of the lease was on said date delivered physically by a representative of Citizens Gas Company to a representative of the Defendant City and such assignment was placed of record by such representative of the City in the Recorder's office of Marion County, Indiana, along with the other three instruments of conveyance at that time physically delivered by said representative of Citizens Gas Company to said representative of the City of Indianapolis; that at the same time the City, through the Board of Directors for Utilities, adopted resolutions declining to accept an assignment of the lease, caused these resolutions to be recorded in the Recorder's office of Marion County, Indiana, and a duly certified copy of them to be served on Citizens Gas Company and Indianapolis Gas Company.

## 29.

That the Citizens Gas Company operated under the terms of the franchise contract referred to in Findings of Fact No. 18 and the amendments thereto from the date of the assignment thereof by the individuals to whom the franchise had originally been granted until August 27, 1921, at which time, pursuant to the terms of an Indiana statute authorizing it to do so, it filed with the Public Service Commission of Indiana its declaration of surrender of said franchise and accepted an indeterminate permit with the result that from August 27, 1921, until September 9, 1935, Citizens Gas Company operated as a public utility under such indeterminate permit.

## 30.

That, prior to September 9, 1935, all of the conditions fixed in the said instruments and enactment as precedent to the duty and authority of Citizens Gas Company to convey and transfer the said property had been fully and completely performed so that on said date nothing further remained to be performed or done by the City of Indianapolis to entitle it in law to have all of said property conveyed and transferred to it as aforesaid. On said date, Citizens Gas Company, by its proper corporate officers, executed and delivered instruments of conveyance and transfer of all of the said property to the City of Indianapolis, in the manner and form, and in strict compliance with its duty and authority so to do, as aforesaid.

## 31.

(Stricken out by consent of Citizens Gas Company before signing, 9/21/39. R. C. B.)

## 32.

That, on September 9, 1935, Citizens Gas Company transferred its gas producing and distributing plant and system to the City and since that time the City, as trustee of the Public Charitable Trust created in 1905 and 1906, has operated said gas producing and distributing plant and system. Since September 9, 1935, Citizens Gas

Company has not been engaged in any business of any nature whatsoever, and it has no property at this time.

## 33.

That Citizens Gas Company, its Board of Directors, Voting Trustees and Officers, in making the conveyance, transfer and assignment of all of its property to the City of Indianapolis, fully and completely performed and exhausted all of the duties, powers and authority of Citizens Gas Company as initial trustee of the said public charitable trust. Neither it, nor its Board of Directors, Voting Trustees or any of its officers, from and after September 9, 1935, has any further duties, powers or authority as initial trustee of the said public charitable trust, or to hold, own, lease, manage or operate any property or business of any nature whatsoever.

## 34.

That, prior to the 26th day of February, 1913, the Trustees and Directors of Citizens Gas Company suggested that one Volney T. Malott and a group of Indianapolis businessmen purchase the capital stock of The Indianapolis Gas Company or an amount in excess of three-fourths thereof, thereby making possible a merger of the systems of the two companies under the unified control and operation of Citizens Gas Company; and the purchase of the capital stock of The Indianapolis Gas Company was made by said Indianapolis syndicate pursuant to said suggestion; that prior to such purchase of such stock, it was understood by those promoting the transaction that a lease would be entered into by and between the two gas companies, similar to the one in question.

## 35.

That, on or about May 21, 1913, The Indianapolis Gas Company, Lessor, and Citizens Gas Company, Lessee, jointly submitted a tentative form of lease to Public Service Commission of the State of Indiana and jointly petitioned said Commission to adopt and approve the terms and conditions set forth in said form of lease and to authorize them to enter into and execute the same. A correct copy of the finding and order of said Commission with re-

spect to said lease is attached to the bill of complaint in this cause marked Exhibit D and is by reference made a part of these Findings.

## 36.

That it appears in the finding and order of the Public Service Commission last referred to that Joseph B. Kealing, Corporation Counsel of the City, appeared, after being served with notice so to do, for the City in said proceeding, but there is no evidence in this case that the Corporation Counsel for the City had any power or authority to bind the City in respect of said lease or the approval of the lease by said Commission.

## 37.

That Newton Todd, a beneficial certificate holder of Citizens Gas Company, commenced an action in the United States District Court for the Southern District of Indiana on April 30, 1929, against the Citizens Gas Company, the individuals who were voting trustees of its common stock, the City, the Mayor, Clerk and Members of the Board of Public Works of the City; that neither The Indianapolis Gas Company, The Chase National Bank, as Trustee, etc., nor any predecessor trustee, nor any bondholder of The Indianapolis Gas Company was a party defendant, or an intervenor in said cause; and that no pleading was filed in the Todd case asserting either the validity or invalidity of the lease.

The issues tendered by the bill in the Todd case were:

(a) That the original agreement between the City and Citizens Gas contained in the franchise contract of 1905 was abrogated and annulled when Citizens Gas Company surrendered the franchise and accepted an indeterminate permit.

(b) That the surrender of the franchise and the acceptance of an indeterminate permit created a new contract between the State and Citizens Gas Company, one of the terms of which was that the City should have the right to acquire the property of Citizens Gas Company at a value to be determined by the Public Service Commission.

(c) That an Act of the Indiana General Assembly of 1929 purporting to legalize all of the provisions of the Articles of Incorporation of Citizens Gas Company and

particularly those in respect of the mode of acquiring the plant and property of Citizens Gas Company by the City, resulted in an impairment of the obligations of the contract above referred to in violation of the Constitutions of Indiana and of the United States.

(d) That the franchise contract of 1905 merely gave an option to the City to purchase the property of the Citizens Gas Company and this resulted in a violation of the rule against perpetuities.

The issues involved in the present case are wholly different from those involved in the Todd case. The question of the validity and enforceability against the City of the lease was neither involved nor determined in the Todd case and could not have been determined under the issues presented to this court in that case.

The Todd case was finally disposed of on May 18, 1931, when the Supreme Court of the United States denied Todd's application for a writ of certiorari and no controversy had ever arisen or existed in connection with the validity or invalidity of the lease prior to July, 1935. Until the transfer of the trust res by Citizens Gas Company to the City, all payments provided for by the terms of said lease had been made as required therein and there had been no breach or threatened breach by Citizens Gas Company of its covenants under said lease, under the issues presented at this time for determination.

38.

That The Indianapolis Gas Company and Citizens Gas Company filed with the Public Service Commission of Indiana a joint petition asking for the approval of the lease; that Frank S. Fishback, a citizen of Indianapolis and a stockholder in the Citizens Gas Company, intervened, raised certain objections to the approval of the lease and after the Commission had entered an order approving the same filed a petition for a rehearing which was overruled; that a correct copy of such joint petition, the intervening petition of Fishback and his petition for rehearing are found in Plaintiffs' Exhibit 13.

That neither The Chase National Bank, as Trustee, etc., nor any predecessor trustee of The Indianapolis Gas Company, nor any bondholder of The Indianapolis Gas Company was a party to such proceedings.

That when the Public Service Commission of Indiana



approved the execution of the lease no claim had been asserted that the franchise contract of 1905 and other related papers resulted in the creation of a public charitable trust and at the time the Commission's approval was given to the lease it was 17 years before the date when a transfer of the trust property was required to be made to the City. Fishback did not intervene or resist

the approval of the lease by the Public Service Commission as the beneficiary of a public charitable trust.

A complete copy of the order of the Public Service Commission is attached to the complaint as Exhibit D and made a part hereof.

39.

That, on November 28, 1913, Fishback commenced an action in the Superior Court of Marion County, Indiana, against the Public Service Commission of Indiana, Citizens Gas Company, The Indianapolis Gas Company, and the City to vacate and set aside the order approving the execution of the lease.

Fishback sued as a stockholder of Citizens Gas Company and a resident freeholder of the City and not as a beneficiary of a public charitable trust.

Citizens Gas Company and the City were not made parties defendant as the initial and successor trustees of a public charitable trust, but were parties defendant in their individual capacity. There was no averment in the complaint filed by Fishback that a public charitable trust had been created by the franchise contract of 1905.

Fishback sought to set aside the Commission's order partly on the following grounds:

(a) That the rentals fixed in the lease were excessive and that their payment by the Citizens Gas Company would result in a waste and misapplication of its funds and its inability to pay dividends due its stockholders.

(b) That the Citizens Gas Company was without power to enter into the lease without the consent of the owners of three-fourths ( $\frac{3}{4}$ ) in amount of its capital stock, which consents had not been obtained.

(c) That the City had not given its consent to such lease, had not joined in the execution thereof, and had granted to Citizens Gas Company no right to operate the property of Indianapolis Gas Company.

(d) That the findings and order of the Public Service

Commission were not sustained by sufficient evidence and were contrary to law.

(e) That Citizens Gas Company had no power to enter into the agreement contained in the lease permitting the Public Service Commission to fix rates at which it should sell gas.

(f) That the obligation assumed by the Citizens Gas Company under the terms of said lease to pay interest on the bonds and dividends on the stock of The Indianapolis Gas Company impaired the obligation of the contract existing between the Citizens Gas Company and plaintiff and other stockholders of that company in that it prevented it from executing a mortgage at the end of the franchise term in order to pay the stockholders of that company the par value of their stock and accumulated dividends thereon.

(g) That the lease, as executed, would prevent the fulfillment of the contract between the City and Citizens Gas Company and would prevent the City from taking over the gas system.

(h) That the City had not given its consent to such lease.

474 Prior to the entry of final judgment in the Fishback case, Fishback dismissed the City as a party defendant and the following order book entry was made in connection with such dismissal:

"Come now the parties and the plaintiff now dismisses the action, as against the defendant City of Indianapolis, upon which dismissal the court now enters judgment for costs against the plaintiff."

Fishback elected to stand upon his complaint and to abide the ruling of the court upon demurrers which had been sustained to each paragraph of said complaint and judgment was rendered against him.

The City was not a party to the final judgment rendered in the cause.

Neither The Chase National Bank, Trustee, etc., nor any other trustee under The Indianapolis Gas Company mortgage nor any bondholder was a party plaintiff, defendant or intervenor in the Fishback case.

Fishback prayed an appeal from the decree of the Marion Superior Court to the Supreme Court of Indiana, which dismissed the appeal because it was not perfected in time.

The first Indiana Declaratory Judgment Act became effective on May 16, 1927. At the date of the final dispo-

sition of the Fishback case there was neither an existing controversy nor the ripening seeds of such controversy between The Indianapolis Gas Company, the trustees of its mortgage or its bondholders and the City as to the enforceability of the lease against the City or the trust property.

Up to the date when Fishback dismissed his cause against the City no issue had been presented between the City and The Indianapolis Gas Company as to the validity of the lease.

There was neither in issue nor decided by the Court in the Fishback case any question as to the validity or enforceability against the City of the lease.

The Fishback case was tried and decided on the theory that whether the lease was valid for its entire term or not the action of the Public Service Commission of Indiana in approving the same could not be vacated or set aside.

Since the determination of the Fishback case new facts have occurred which alter the legal rights and relations of the parties thereto, viz.: the transfer of the trust res to the City as successor trustee on September 9, 1935.

After the city had been dismissed as a party defendant in said cause it was not again made a party thereto.

That during the pendency of the Fishback case, certain extensions of the mains of The Indianapolis Gas Company property were made in accordance with the provisions contained in Section 27½ of the lease.

475

40.

That, on March 12, 1930, Allen G. Williams as a resident and taxpayer of the City on behalf of himself and all others similarly situated commenced an action in which Citizens Gas Company, its voting trustees and directors, The Indianapolis Gas Company, the City of Indianapolis, the then trustees under The Indianapolis Gas Company mortgage, the Mayor, City Clerk, Board of Public Works, Boards of Trustees and Directors for the Department of Utilities of the City and the Public Service Commission of Indiana were defendants. The complaint alleged, in part, that the lease was invalid, that the order of the Public Service Commission approving the lease was unlawful because the Act creating such Commission was unconstitutional, that the lease was burdensome upon the trust and that it was ultra vires said

Citizens Gas Company, etc. A demurrer to plaintiffs' complaint was filed by the Public Service Commission, another by The Indianapolis Gas Company and its mortgage trustees and a third by the remaining defendants. The demurrers so filed were sustained, judgment was rendered against Williams and the case was appealed to the Supreme Court of Indiana and affirmed.

Neither a controversy nor the ripening seed of such a controversy existed at any time prior to the date of the final disposition of the Williams case between the City and The Indianapolis Gas Company or its mortgage trustees or bondholders as to the enforceability against the City of the lease. The transfer of the trust res from Citizens Gas Company to the City as successor trustee was not made until long after the final disposition of the Williams case.

In the Williams case plaintiff attempted to procure a determination of the invalidity of the lease on the ground that execution of the lease violated the Constitutions of the United States and the State of Indiana and had been obtained as the result of conspiracy. None of the questions involved in this case were actually litigated in the Williams case nor could such questions have been litigated under the issues in that case.

No issue was made between The Indianapolis Gas Company, its mortgage trustees or its bondholders and the City or the Board of Trustees and Directors of the Department of Utilities in connection with the enforceability of said lease against the City, although the City had pointed out in a joint motion filed by it and Citizens Gas Company to strike out parts of plaintiffs' complaint that the validity of the public charitable trust was in no wise affected by the validity of such lease.

It was stated in said motion:

"If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust and is subject to be administered in the same way as the property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid it will fall outside the scope of the trust."

41.

That, at the date of the execution and delivery of the lease \$4,833,000 total face amount of Indianapolis 476 Gas Bonds were outstanding. Between June 22,

1914, and February 11, 1932, upon the request of The Indianapolis Gas Company, the mortgage trustees authenticated and delivered to The Indianapolis Gas Company additional bonds in the total principal amount of \$2,048,000. Pursuant to the provisions of the lease, The Indianapolis Gas Company, in turn, delivered \$1,971,000 principal amount of said additional bonds to Citizens Gas Company for the purpose of reimbursing Citizens Gas Company for eighty-five per cent (85%) of its capital expenditures on account of extensions and betterments to the plant and system of The Indianapolis Gas Company made and paid for by Citizens Gas Company. As a result of such expenditures for extensions and betterments and the reimbursement by issuance of bonds, Citizens Gas Company has expended for additions and betterments to the plant of The Indianapolis Gas Company approximately \$200,000 for which it has received no reimbursement. All additions and betterments to the plant of The Indianapolis Gas Company for which bonds were issued were made with its consent and under the terms of said lease said additions and betterments became and are the property of The Indianapolis Gas Company. All of said bonds in the principal amount of \$1,971,000 were sold by Citizens Gas Company except bonds in the principal amount of \$18,000 which were retained by it. The proceeds of the bonds sold by Citizens Gas Company were received and used by it. It was many years after the execution of the lease before plaintiff in this action received a copy of the same.

There is no proof that any predecessor trustee of The Chase National Bank which certified bonds either knew of the existence of the lease or relied upon it as a basis for a certification of any The Indianapolis Gas Company bonds.

42.

That the Citizens Gas Company operated the plant and property of The Indianapolis Gas Company under said lease from November 2, 1913, until September 9, 1935. From October 2, 1913, until September 9, 1935, Citizens Gas Company from time to time duly paid the interest on the outstanding Indianapolis Gas Company bonds by making payment thereof to the holders of the bonds either at the office of the trustee or directly to such holders. During that period Citizens Gas Company paid all the rentals payable in cash under the terms of the

lease and also paid all the taxes required to be paid by the Lessee under the terms of the lease; that the total payments so made by Citizens Gas Company are shown in Exhibit 20 attached to the Stipulation in this case, which exhibit, by reference, is made a part of and incorporated into these Findings.

That for the five (5) year period immediately preceding September 9, 1935, the aggregate payments made by Citizens Gas Company on account of the lease were approximately \$600,000 annually.

## 43.

That from the period of its organization in 1906 to June 30, 1935, Citizens Gas Company paid dividends 477 to the holders of its common stock at the rate of ten per cent per annum; and that on September 9, 1935, when Citizens Gas Company conveyed, transferred and assigned its property to the City it turned over a sum of approximately \$411,000 in cash or current funds to the City.

## 44.

That between the years 1914 and 1935, in the sale of bonds of The Indianapolis Gas Company, certain representations with reference to the lease were made by the brokers having such bonds for sale, but the evidence fails to show that any present owner of any such bonds knew of, relied upon, or was in any manner influenced by such representations.

## 45.

That, on March 20, 1929, the City, through its Board of Public Works, adopted a resolution, a correct copy of which marked Exhibit 22 is attached to the Stipulation in this case and is by reference made a part of these Findings; that on April 3, 1929, the Directors of Citizens Gas Company unanimously adopted two resolutions, copies of which, marked Exhibits 23 and 24, are attached to the Stipulation in this case and by reference made a part of this Finding; that on April 3, 1929, the Board of Trustees of the Citizens Gas Company unanimously adopted a resolution approving resolutions adopted by the Board of Directors of Citizens Gas Company; and that the resolutions referred to above in this subdivision of this stipu-



lation contain demands by the City upon Citizens Gas Company that in accordance with the provisions of the franchise contract "the plants, property and assets of said Company be conveyed to said City of Indianapolis" and a recognition by Citizens Gas Company that it was obligated to make such conveyance.

## 46.

That, in pursuance of a resolution adopted on May 7, 1935, by the Board of Directors for Utilities of the City, a public offering of \$8,000,000 of Indianapolis Gas Plant Revenue Bonds was made on May 28, 1935; that a copy of said Resolution, adopted May 7, 1935, is identified as Exhibit 47 to the Stipulation in this case and is by reference incorporated into these Findings; that a correct copy of the notice by the City Controller of the City pursuant to said resolution marked Exhibit A is attached to the answer and counterclaim of the City in this case and is by reference made a part of this Finding; that Resolutions similar to that of May 7th, 1935, were adopted by the Board of Directors for Utilities for the City on April 5th, April 10th and April 12th, 1935, and advertisements were published in pursuance of said resolutions on April 8th, April 12th, and April 18th, 1935, respectively; that said resolutions were substantially identical with Exhibit 47 to said Stipulation; that said advertisements were substantially identical with Exhibit A to the answer and counterclaim of the City; and that no bid resulting from said advertisements of April 8th, April 12th and April 18th, 1935, was acceptable to the City.

478 Later, viz. on May 29, 1935, a joint bid of Halsey Stuart & Company, of Chicago, Illinois, and Otis & Company, of Cleveland, Ohio, for said revenue bonds was accepted by the City. The proceeds of the sale of said Revenue Bonds were received by the City June 27, 1935.

## 47.

That the purchasers of said revenue bonds issued an advertising circular, a correct copy of which marked Exhibit B is attached to the answer and counter-claim of the City and is by reference made a part of this Finding.

Before the issuance of said advertising circular Halsey, Stuart & Company and Otis & Company asked the City to



approve the circular which was to be issued by them and were advised by the City and its representatives that the only authority which the City had in connection with the sale of revenue bonds was to make a public offering and that the City had no authority to approve or become responsible for any representations made in connection with the resale of said revenue bonds by the purchasers thereof.

That the circular and newspaper advertising issued by the purchasers of said revenue bonds were issued solely on their own authority and without authorization by the City and that there is no evidence to show that any persons who purchased said Gas Plant Revenue Bonds of the City did so on the faith of any representation made by the City or its authorized agents.

Any representations made by the purchasers of such bonds were never ratified or approved by the City or any of its authorized representatives.

48.

That the City caused the sum of \$2,500,000 to be paid on or about July 1, 1935, for the retirement of all of the Citizen Gas Company's common stock; that said \$2,500,000 included \$2,000,000 as the par value of said common stock and \$500,000 as dividends thereon at the rate of ten per cent per annum from January 1, 1933, to June 30, 1935. The City also caused the sum of \$1,050,000 to be paid on or about September 1, 1935, for the redemption of all of the Citizens Gas Company's preferred stock in full satisfaction of the preferred stockholders' interest in the property and assets of Citizens Gas Company; that said \$1,050,000 included \$1,000,000 as the par value of said preferred stock and \$50,000 as the premium of five per cent on the redemption thereof required by the terms of said preferred stock. Citizens Gas Company paid all the dividends on said preferred stock up to the time of said redemption. All of said common stock was retired and all of said preferred stock was redeemed.

49.

That, on August 9, 1935, the Board of Directors for Utilities of the City adopted a resolution with respect to the payment of the mortgage bonds of the Citizens Gas Company dated July 1, 1912, a copy of which resolution

is attached to the Stipulation in this cause, marked 479 Exhibit 48 and by reference made a part of this Finding. In pursuance of said resolution the City on August 10, 1935, published a notice, a copy of which, marked Exhibit 49, is attached to the Stipulation in this cause and in September, 1935, published a notice, a copy of which, marked Exhibit 50, is attached to the Stipulation in this cause, both of which exhibits marked 49 and 50 are by reference made a part of this Finding. The principal amount of Citizens Gas Company bonds outstanding on August 12, 1935, was \$2,745,000. All of said bonds have been paid and surrendered excepting bonds aggregating the principal amount of \$32,000.

Before payment of said bonds had been made by the City it was advised by its counsel that said Citizens Gas Company mortgage had been executed in violation of the terms of said public charitable trust, but that the moneys which Citizens Gas Company had received from the sale of the mortgage bonds had been used in additions to and betterments of the trust res and that the holders of the bonds had an equitable lien on the property for their debt; that it was in pursuance of this advice that the City paid said mortgage bonds.

That in the payment of the common and preferred stock of Citizens Gas Company and the dividends thereon and the premiums on the retirement of the preferred stock the City proceeded in accordance with the decree of this court and the Circuit Court of Appeals in the Todd and Cotter cases, above referred to, and that it was required to make said payments before taking over the res of the public charitable trust hereinbefore described and that in so doing it did not recognize directly or by implication the validity or enforceability against the City of the lease.

## 50.

That prior to the transfer to the City of the plant and property of Citizens Gas on September 9, 1935, neither the City nor its Department of Utilities gave any notice to The Chase National Bank, Trustee, etc., or any formal notice to any holder of The Indianapolis Gas Company bonds that said transfer and conveyance was to be made, but The Indianapolis Gas Company was fully advised of said transfer and as early as July 23, 1935, was advised that the City would not accept an assignment of the lease; that wide publicity of the fact that said transfer was to

be made appeared in the newspapers, including the publicity incident to the sale of the revenue bonds.

## 51.

That in pursuance of agreements made between the City and The Indianapolis Gas Company, which agreements have been continuously in effect since September 9, 1935, the City has operated the gas producing and distributing plant and system of The Indianapolis Gas Company. Such agreements provided, among other things, in substance that such operation by the City should not prejudice the rights of either the City or The Indianapolis Gas Company, and further provided that the City by operating such plant did not recognize the validity of the lease and The Indianapolis Gas Company by consenting to such operation did not admit that the lease was invalid.

480

## 52.

That on March 2, 1936, the City and The Indianapolis Gas Company entered into a written agreement, a correct copy of which is attached to the complaint in this case, marked Exhibit H and is by reference made a part of these Findings; that said agreement has never been modified or supplemented in any respect.

That no settlement agreement as provided for in said contract of March 2, 1936, has ever been agreed upon between the City and The Indianapolis Gas Company.

## 53.

That The Indianapolis Gas Company did not pay any of the interest coupons due on October 1, 1936, April 1, 1937, October 1, 1937, April 1, 1938, October 1, 1938, and on April 1, 1939 on any of The Indianapolis Gas Company bonds and all of said interest coupons remain unpaid.

## 54.

That the City, pursuant to the terms of the agreement of March 2, 1936, has from time to time made deposits with the escrow agent, The Indiana National Bank of Indianapolis, which deposits on December 31, 1938, aggregated the sum of \$1,217,875 which sum is now held by

said Bank, and said Bank has never at any time paid out any of the sums so deposited with it. All of the sums so deposited with said Bank have been derived from and are part of the proceeds of the City's operation of the property transferred, conveyed and assigned to it by Citizens Gas Company and the property of The Indianapolis Gas Company covered by the lease.

## 55

That the City also has paid pursuant to the terms of the agreement of March 2, 1936, the sum of approximately \$171,000, being an amount equal to the interest due on The Indianapolis Gas Company bonds on March 30, 1936.

## 56.

That all payments made by the City of sums of money equal to the interest on the Indianapolis Gas Company bonds, dividends payable under the terms of the lease of September 30, 1913, or any of the moneys now in escrow at The Indiana National Bank of Indianapolis, would not have been made in the absence of the agreement of March 2, 1936, for the temporary use of the property of The Indianapolis Gas Company, and certain correspondence exchanged between The Indianapolis Gas Company and attorneys for the City in connection with the payments so made, in which contract of March 2, 1936, and correspondence it was agreed that neither the temporary operation of the property nor the payment of such monies by the City should in any way prejudice the City's rights or without such operation and payments or the execution of the agreements constituting an admission on the part of the City of the validity or binding effect upon the City of the lease.

481 The agreement of March 2, 1936, did not result in the default of interest payments due on the bonds because in the absence of such agreement the City would not have made payments of sums equal to the interest, and such agreement was not inimical to the interest of plaintiff or any of the bondholders whom it represents.

## 57.

That on March 11, 1936, and prior to the date when the City paid the money equal to the interest referred to in subdivision of this finding and before it had deposited any sums in escrow with The Indiana National Bank as escrow agent, the trustee and two of the principal bondholders of The Indianapolis Gas Company were advised of the making of such agreement and the terms thereof and they made no objection thereto but received and accepted the sum of \$171,000 with full knowledge of the terms of said agreement.

## 58.

That on September 9, 1935, the Directors of Citizens Gas Company adopted a resolution, a copy of which, marked Exhibit 86, is attached to the Stipulation and is by reference made a part of this finding. On the same day, the Board of Trustees of Citizens Gas Company adopted a resolution, a copy of which, marked Exhibit 87, is attached to the stipulation in this case and by reference made a part of this finding.

Pursuant to the requirements contained in each of said resolutions, the City on September 9, 1935, executed and delivered to Citizens Gas Company an indemnifying agreement, a correct copy of which marked Exhibit J, is attached to the second amendment to the complaint in this cause and by reference made a part hereof.

## 59.

That prior to the commencement of this action neither plaintiff nor any of the bondholders of The Indianapolis Gas Company made any request or demand upon The Indianapolis Gas Company that it commence or prosecute an action in a court of competent jurisdiction to obtain a determination or declaration of the validity or invalidity of the lease.

## 60.

That the City has been a first class city within the meaning of the Indiana Statutes continuously since January 1, 1910. No other city of Indiana has been a first class city during any of said period. The City has had a population

exceeding 300,000 continuously since January 1, 1920, and no other city of Indiana has had such a population of 300,000 during any of such period.

## 61.

That as early as September 19, 1935, plaintiff was advised by its bondholders who had seen newspaper reports that the City was attempting to abrogate the lease, as shown by a letter of that date addressed to the President of The Indianapolis Gas Company by plaintiff.

482

## 62.

That neither the bondholders who requested the Trustee to bring this suit nor The Indianapolis Gas Company, nor any other person, firm or corporation, agreed to indemnify the Trustee for its costs, attorneys' fees or expenses in bringing this suit.

## 63.

That on September 28, 1935, the firm of which Newton D. Baker was the senior member, was employed by The Indianapolis Gas Company as special counsel in the controversy respecting the validity and enforceability against the City of the lease. That firm gave an opinion on the question of the validity and enforceability against the City of the lease in November, 1935. Mr. Baker's firm continued to represent The Indianapolis Gas Company until May 13, 1936.

## 64.

That on March 11th and April 10th, 1936, meetings were held at the office of The Chase National Bank in New York attended by representatives of that Bank, The Indianapolis Gas Company, and two of the principal bondholders of The Indianapolis Gas Company, The Massachusetts Mutual Life Insurance Company, and New England Mutual Life Insurance Company; that at these meetings it was arranged that the two insurance companies there represented would request the Trustee for the Bondholders to obtain an opinion from the law firm of Newton D. Baker, Esq., of Cleveland, Ohio, as to the validity of the lease and as to its enforceability against the City of

Indianapolis, and as to whether certain costs and expenses of litigation necessary to determine those questions would be a prior lien against the property of The Indianapolis Gas Company; that such a letter would be written, and if favorable reply received, employment would be tendered to that firm to institute the proceeding; that no member of Mr. Baker's firm attended either of these meetings, and there is no evidence to indicate that either Mr. Baker or any member of his firm had any prior knowledge of these conferences. The letters written by the two insurance companies above referred to are in evidence as Plaintiffs' Exhibits 125 and 126.

## 65.

That request was made by plaintiff of Mr. Baker's firm in accordance with the plan devised as set forth in Findings of Fact No. 64, but it was advised by his firm that it was then employed by The Indianapolis Gas Company, and that it could not accept employment for the Trustee unless released by such company. It was afterwards released, accepted employment by Trustee and began this action.

## 66.

That after Mr. Baker's firm had been released from its employment by The Indianapolis Gas Company, it consulted and advised with The Indianapolis Gas Company's attorneys residing in Indianapolis as to the preparation and form of the complaint, accepted suggestions made 483 by such attorneys in respect thereof and cooperated with them in the preparation and filing of the complaint.

## 67.

That after the complaint was filed Mr. Baker's firm representing plaintiff, and local attorneys for The Indianapolis Gas Company consulted and advised with each other both as to the facts and the law in the presentation and prosecution of the case, both plaintiff and defendant being interested in upholding the validity of the lease.



68.

That there was no collusion between The Indianapolis Gas Company and plaintiff or any other party to this cause in the bringing or prosecution of this action.

(Signed) Robert C. Baltzell,  
*Judge, United States District Court.*

September 21, 1939.

### Conclusions of Law.

Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows, to-wit:

1.

That plaintiff has such an interest in the lease as to give it authority to maintain this action; that there was no collusion between plaintiff and defendant, The Indianapolis Gas Company, prior to, at the time of, or since the commencement of this action; that there is a collusion of interest between plaintiff and all defendants, including The Indianapolis Gas Company, and that this court has jurisdiction to try and determine this cause.

2.

That the order of the Public Service Commission approving the lease, and the judgments and decrees in the Fishback, Todd and Williams cases are not res adjudicata of the validity and binding effect of the lease upon either the Citizens Gas Company or the City of Indianapolis.

3.

That the City is not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

484

4.

That the Citizens Gas Company is not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

5.

That the lease is **invalid and unenforceable** against the City for each of the following reasons, among others:

(a) Citizens Gas Company, as initial trustee of a public charitable trust with a fixed date of expiration of its trusteeship had no power or authority to execute a lease for 82 years beyond the expiration of its term of trusteeship which would be binding upon or enforceable against its successor trustee, the City, a municipal corporation.

(b) The trust instruments conferred no specific power upon the initial trustee to execute such a lease as Lessee and properly construed precluded the initial trustee from executing such a lease.

6.

That the lease is not a valid or enforceable obligation against Citizens Gas Company, and said Company was entirely and completely released and discharged from all present and future obligation and liability under said lease, by the conveyance, transfer and assignment of all of its property and assets to the City on September 9, 1935.

7.

That the agreement of March 2, 1936, between the City and Indianapolis Gas Company was not inimical to the interests of plaintiff or the bondholders which it represents.

8.

That the plaintiff is entitled to judgment against the defendant, The Indianapolis Gas Company, in the sum of One Million Thirty-two Thousand One Hundred and Fifty Dollars (\$1,032,150.00) with interest thereon at the rate of six per cent (6%) from and after the date of judgment.

9.

That the plaintiff should take nothing in this action as against the defendant, Citizens Gas Company, under the issues presented at this time for determination.

## 10.

That the plaintiff should take nothing in this action as against the defendant, City of Indianapolis, under the issues presented at this time for determination.

to each of which findings and conclusions, the plaintiff and the defendant, The Indianapolis Gas Company, each excepts.

(Signed) Robert C. Baltzell,  
*Judge, United States District Court.*

September 21, 1939.

Entered  
Sept. 21,  
1939.

485 (Entry for September 21, 1939, continued)

It Is Therefore Declared, Adjudged and Decreed by the Court:

1. That plaintiff has such interest in the lease dated September 30, 1913, from The Indianapolis Gas Company of Indianapolis, Indiana, to the Citizens Gas Company of Indianapolis, Indiana, as to give it authority to maintain this action; that there was no collusion between plaintiff and defendant, The Indianapolis Gas Company, prior to, at the time of, or since the commencement of this action; that there is a collision of interest between plaintiff and all defendants, including The Indianapolis Gas Company, and that the Court has jurisdiction to try and determine this cause.

2. That neither the order of the Public Service Commission of the State of Indiana approving the above described lease, nor the judgment in the cases of *Frank S. Fishback v. Public Service Commission of Indiana, et al.*, *Newton Todd v. Citizens Gas Company, et al.* and *Allen G. Williams v. Citizens Gas Company, et al.*, nor either of them, are res adjudicata of the validity and binding effect of the above described lease upon the City of Indianapolis, Indiana, and the individual defendants, who are members of the Board of Trustees and Directors of the Department of Public Utilities of said City nor upon the defendant, Citizens Gas Company.

3. That the lease dated September 30, 1913, from The Indianapolis Gas Company, of Indianapolis, Indiana, to the Citizens Gas Company of Indianapolis, Indiana, is invalid and unenforceable against either (1) the defendant, City of Indianapolis; (2) the individual defendants, who  
486 are members of the Board of Trustees or of the Board of Directors for Utilities of said City; (3) the prop-

erty formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by said City through its Department of Utilities; (4) The Indianapolis Gas Company; or (5) the Citizens Gas Company of Indianapolis.

4. That the agreement of March 2, 1936, between the City of Indianapolis and The Indianapolis Gas Company was not inimical to the interests of the plaintiff or the bondholders which it represents.

5. That the plaintiff recover of and from the defendant, The Indianapolis Gas Company, the sum of \$1,032,150.00, together with interest thereon at the rate of 6% per annum from and after the date of this judgment.

6. That the plaintiff take nothing in this action as against the defendant, Citizens Gas Company, under the issues presented at this time for determination.

7. That the plaintiff take nothing in this action as against the City of Indianapolis and the individual defendants who are members of the Board of Trustees and Directors of the Department of Utilities of said City or against the property conveyed to said City by the Citizens Gas Company on September 9, 1935, under the issues presented at this time for determination.

To which judgment, the plaintiff and the defendant The Indianapolis Gas Company each excepts.

487 And afterwards towit at the May Term of said Court, on the 20th day of October, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now the plaintiff in the above entitled cause by its attorneys, and files notice of appeal to the Circuit Court of Appeals for the Seventh Circuit, which notice of appeal is as follows:

Filed  
Oct. 20,  
1939.

488 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

<p>The Chase National Bank of the City of New York, Trustee, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>Citizens Gas Company of Indian- apolis, <i>et al.,</i> <i>Defendants.</i></p>	}	<p>In Equity Cause No. 1844.</p>
---	---	--------------------------------------

### NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Notice is hereby given that The Chase National Bank of the City of New York, Trustee under the Mortgage Deed of Trust of The Indianapolis Gas Company dated October 1, 1902, plaintiff in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment and decree entered in this action on September 21, 1939.

(signed) William L. Taylor,

(signed) Howard F. Burns,

(signed) John Adams,

*Solicitors for Plaintiff-Appellant, The  
Chase National Bank of the City of  
New York, Trustee.*

489 (Further Entry for October 20, 1939)

And said plaintiff also files bond on appeal in the sum of \$250.00 with American Surety Company as surety, which bond is as follows:

490 IN THE DISTRICT COURT OF THE UNITED STATES.

\* \* (Caption—1844) \* \*

### BOND ON APPEAL.

Know All Men By These Presents that we, The Chase National Bank of the City of New York, Trustee, as principal, and American Surety Company of New York, as

surety, are held and firmly bound unto Citizens Gas Company of Indianapolis, a corporation, The Indianapolis Gas Company, a corporation, the City of Indianapolis, a municipal corporation, Thomas D. Sheerin, A. Dallas Hitz, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, and Henry L. Dithmer, Brodehurst Elsey, Roy Sahn, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach, and John E. Ohleyer as members of the Board of Directors for Utilities of the City of Indianapolis (hereinafter referred to as the "obligees") in the full and just sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said obligees, their heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Executed this 20 day of October, 1939.

The condition of this obligation is such that:

Whereas, on the 21st day of September, 1939, in the above entitled action between the above named The Chase National Bank of the City of New York, Trustee, plaintiff, and the above named obligees, as defendants, a judgment was rendered against the said plaintiff and the said plaintiff has appealed to the United States Circuit Court of Appeals for the Seventh Circuit:

Now, Therefore, if said The Chase National Bank of the City of New York, Trustee, shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award, if the judgment is modified, then the above obligation to be void; otherwise in full force and effect.

The Chase National Bank of the  
City of New York, Trustee

By (signed) Howard F. Burns

*Attorney in fact.*

American Surety Company of New York

By (signed) Thos. W. King (Thos. W. King)

*Resident Vice-President*

(Seal) Attest (signed) India Miller (India Miller)

*Resident Asst. Secretary*

Sealed and Delivered

in the presence of:

(signed) Orville T. Fox

(signed) Leon B. Slack

Filed  
Oct. 28,  
1939.

491 And afterwards to-wit at the May Term of said Court, on the 28th day of October, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to-wit:

Comes now the plaintiff by its attorneys, and files Statement of Points, which is as follows:

492 IN THE DISTRICT COURT OF THE UNITED STATES.

\* \* (Caption—1844) \* \*

### STATEMENT OF THE POINTS ON WHICH PLAINTIFF-APPELLANT INTENDS TO RELY ON APPEAL.

Now comes The Chase National Bank of the City of New York, Trustee, the plaintiff in the above entitled cause and the appellant in the Circuit Court of Appeals, and in connection with its appeal files the following Statement of Points on which it intends to rely on its appeal to the Circuit Court of Appeals for the Seventh Circuit from the final decision of the District Court entered on the 21st day of September, 1939.

The said District Court erred in the following respects:

1) In failing to grant plaintiff's motion filed January 14, 1939, to strike immaterial matter from the answer of defendants the City of Indianapolis, et al.

2) In failing to grant plaintiff's motion filed January 14, 1939, to strike immaterial matter from the counterclaim of defendants the City of Indianapolis, et al.

3) In holding that the lease dated September 30, 1913, from The Indianapolis Gas Company to the Citizens Gas Company (hereinafter referred to as the "Lease") is invalid and unenforceable against either

a) The defendant City of Indianapolis,

493 b) The individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of said City,

c) The property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by the said City through its Department of Utilities,

d) The Indianapolis Gas Company,

e) The Citizens Gas Company of Indianapolis, or

f) The defendant City of Indianapolis as successor to



Citizens Gas Company as trustee of the public charitable trust,  
making this a separate and distinct point as to each of said holdings separately.

4) In failing and refusing to hold that the Lease is binding and enforceable against

a) The defendant City of Indianapolis,

b) The individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of said City,

c) The property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by said City through its Department of Utilities,

d) The Indianapolis Gas Company,

e) The Citizens Gas Company of Indianapolis, and

f) The defendant City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,

making this a separate and distinct point as to the Court's failure to make each of said holdings.

5) In holding that neither

a) The order of the Public Service Commission of the State of Indiana approving the Lease,

494 b) The judgment in the case of *Frank S. Fishback v. Public Service Commission of Indiana, et al.*

c) The judgment in the case of *Newton Todd v. Citizens Gas Company, et al.*

d) The judgment in the case of *Allen G. Williams v. Citizens Gas Company, et al.*

nor any or all of said orders or judgments, are res judicata of the validity and binding effect of the Lease as against

i) The City of Indianapolis,

ii) The individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of said City,

iii) The City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,

iv) The public charitable trust,

v) The Citizens Gas Company of Indianapolis,

vi) The property of said public charitable trust,

or any one or more of them, making this a separate and distinct point as to each of said orders or judgments separately with respect to the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, separately.

6) In failing and refusing to hold that the order of the Public Service Commission of the State of Indiana approving the Lease is binding upon the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, as to the validity and binding effect of said Lease, making this a separate and distinct point as to the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, separately.

495 7) In failing and refusing to hold that the judgment in the case of *Frank S. Fishback v. Public Service Commission of Indiana, et al.*, is res judicata of the validity and binding effect of the Lease as against the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, making this a separate and distinct point as to the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, separately.

8) In failing and refusing to hold that the judgment in the case of *Allen G. Williams v. Citizens Gas Company, et al.*, is res judicata of the validity and binding effect of the Lease as against the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, making this a separate and distinct point as to the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, separately.

9) In holding that the agreement of March 2, 1936, between the City of Indianapolis and The Indianapolis Gas Company was not inimical to the interests of the plaintiff or the bondholders which it represents.

10) In holding that the plaintiff was not entitled to judgment against The Indianapolis Gas Company for interest on the overdue coupons on the bonds of The Indianapolis Gas Company from the various dates when such coupons matured.

11) In failing and refusing to give judgment for the plaintiff against The Indianapolis Gas Company for 496 the sum of \$106,655.55 (in addition to the sum of \$1,032,150), being interest at the rate of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment.

12) In failing and refusing to give judgment for the plaintiff against the Citizens Gas Company of Indianapolis for the sum of \$1,032,150, being the amount of the

overdue and unpaid coupons on the bonds of The Indianapolis Gas Company, which coupons the Citizens Gas Company had agreed to pay.

13) In failing and refusing to give judgment for the plaintiff against Citizens Gas Company of Indianapolis for the sum of \$106,655.55 (in addition to the sum of \$1,032,150), being interest at the rate of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment.

14) In failing and refusing to give judgment for the plaintiff against the City of Indianapolis for the sum of \$1,032,150, being the amount of the overdue and unpaid coupons on the bonds of The Indianapolis Gas Company, for which coupons the City of Indianapolis had become liable.

15) In failing and refusing to give judgment for the plaintiff against the City of Indianapolis for the sum of \$106,655.55 (in addition to the sum of \$1,032,150), being interest at the rate of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment.

16) In failing and refusing to give judgment for the plaintiff against the City of Indianapolis, as trustee of the public charitable trust, for the sum of \$1,032,150, being the amount of the overdue and unpaid coupons on the bonds of The Indianapolis Gas Company, for which coupons the City of Indianapolis, as trustee of the public charitable trust, had become liable.

17) In failing and refusing to give judgment for the plaintiff against the City of Indianapolis, as trustee of the public charitable trust, for the sum of \$106,655.55 (in addition to the sum of \$1,032,150), being interest at the rate of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment.

18) In failing and refusing to hold that under the issues presented for determination any amounts due the plaintiff from The Indianapolis Gas Company or Citizens Gas Company or the City of Indianapolis or the City of Indianapolis as successor trustee, including said sum of \$1,032,150, being the amount of the overdue and unpaid coupons on the bonds of The Indianapolis Gas Company, and said sum of \$106,655.55, being interest at the rate

of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment, are a prior charge and first lien upon the property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by the City of Indianapolis through its Department of Utilities.

19) In failing and refusing to hold that under the issues now presented for determination any amounts due the plaintiff from The Indianapolis Gas Company, Citizens Gas Company, the City of Indianapolis or the City of Indianapolis as successor trustee, including said sum of \$1,032,150, being the amount of the overdue coupons on the bonds of The Indianapolis Gas Company, and said sum of \$106,655.55, being the interest on said overdue 498 coupons, are a prior charge and first lien upon all funds held by The Indiana National Bank under the agreement of March 2, 1936.

20) In holding that under the issues presented for determination the plaintiff take nothing in this action as against

- a) The City of Indianapolis,
  - b) The individual defendants who are members of the Board of Trustees or of the Board of Directors of the Department of Utilities of said City,
  - c) The defendant City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,
  - d) The property of said public charitable trust conveyed to said City by the Citizens Gas Company on September 9, 1935,
  - e) Citizens Gas Company,
- making a separate and distinct point as to each of said holdings separately.

21) In holding that

- a) The City of Indianapolis,
- b) The individual defendants who are members of the Board of Trustees or of the Board of Directors of the Department of Utilities of said City,
- c) The defendant City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,
- d) The public charitable trust, and
- e) The property of said public charitable trust or any one or more of them, are not estopped by the conduct of

the City of Indianapolis or by the conduct of Citizens Gas Company as original trustee of the public charitable trust, or both, from denying the validity and enforceability of the Lease against each of them, making this a separate point as to the public charitable trust, the property of said public charitable trust, and each of said defendants, with respect to the conduct of the City of Indianapolis, the Citizens Gas Company, and either of them.

22) In holding that the Citizens Gas Company is not estopped by its conduct from denying the validity and enforceability against it of the Lease.

23) In failing and refusing to hold that

a) The City of Indianapolis,

b) The individual defendants who are members of the Board of Trustees or of the Board of Directors of the Department of Utilities of said City,

c) The defendant City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,

d) The public charitable trust, and

e) The property of said public charitable trust,

or any one or more of them, are precluded by the laches of the City of Indianapolis or by the laches of Citizens Gas Company as original trustee of the public charitable trust, or both, from denying the validity and enforceability of the Lease against each of them, making this a separate point as to the public charitable trust, the property of said public charitable trust, and each of said defendants, with respect to the laches of the City of Indianapolis, the Citizens Gas Company, and either of them.

500 24) In failing to hold that the Citizens Gas Company is precluded by its laches from denying that the Lease is valid and enforceable against it.

25) In holding that the Citizens Gas Company, as initial trustee of the public charitable trust, had no power or authority to execute the Lease.

26) In holding that the Citizens Gas Company, as initial trustee of the public charitable trust, had no power or authority to execute the Lease and make it effective and binding upon or enforceable against:

a) The City of Indianapolis,

b) The individual defendants who are members of the Board of Trustees or of the Board of Directors of the Department of Utilities of said City,

c) The defendant City of Indianapolis as successor to

Citizens Gas Company as trustee of the public charitable trust,

d) The public charitable trust, and

e) The property of said public charitable trust, or any one or more of them, making this a separate point as to the public charitable trust, the property of said public charitable trust, and each of said defendants, separately.

27) In holding that the Citizens Gas Company, as initial trustee, had no specific power to execute the Lease.

28) In holding that the Citizens Gas Company, as initial trustee, was precluded by the trust instruments from executing the Lease.

29) In holding that the Citizens Gas Company was entirely and completely released and discharged from all present and future obligations and liability under the

Lease by the conveyance, transfer, and assignment of 501 all of its property and assets to the City on September 9, 1935.

30) In making the parts of Findings of Fact Nos. 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 30, 32, 33, 36, 37, 38, 39, 40, 41, 44, 47, 49, 50, 51, 56, 57, and 64 hereinafter specifically referred to, each of which parts of said Findings of Fact is

i) Wholly unsupported by the evidence,

ii) Contrary to the manifest weight of the evidence,

iii) An inference or conclusion which is wholly unsupported by the evidence, and

iv) An inference or conclusion which is wholly unwarranted as a matter of law.

Each of the parts of Findings hereinafter referred to is objected to on each of the four grounds just stated, and each of said grounds is relied upon as a separate and distinct point as to each part of said Findings hereinafter enumerated. The District Court erred in finding:

a) That there was no evidence that any present owners of Indianapolis Gas bonds purchased such bonds relying on any acts done or representations made by

i) Citizens Gas Company or any of its authorized officers or agents, or

ii) The City of Indianapolis, or any of its authorized officers or agents (Finding 12).

b) That the purposes and obligations of Citizens Gas Company were fixed and controlled entirely by its original and amended Articles of Incorporation, its by-laws, and the Franchise Contract (Finding 14).

c) That all of the rights, property, and assets acquired



by Citizens Gas Company were held for the purposes  
502 and upon the terms and conditions set forth in its  
Articles of Incorporation and the Franchise Contract  
and for no other purpose and upon no other terms and  
conditions (Finding 15).

d) That the sole purpose and object of the creation and  
existence of Citizens Gas Company was to act as and per-  
form the duties of the initial trustee of the public chari-  
table trust, as specifically set forth in its Articles of In-  
corporation and the Franchise Contract (Finding 16).

e) That Citizens Gas Company had no power or au-  
thority as a corporation to act otherwise than to perform  
the duties of initial trustee of said public charitable trust,  
as specifically set forth in its Articles of Incorporation and  
the Franchise Contract (Finding 16).

f) That the beneficiaries of the public charitable trust  
were the then and future gas users of Indianapolis (Find-  
ing 17(b)).

g) That Citizens Gas Company was trustee "with a  
definitely fixed and limited term of trusteeship" (Find-  
ing 17(c)).

h) That the trust res under said public charitable trust  
"was the property and plant of Citizens Gas Company,  
being the property formerly owned by the Consumers Gas  
Trust Company" (Finding 17(a)).

i) That the Franchise Contract required the Articles of  
Incorporation of Citizens Gas Company to contain the pro-  
visions set forth in paragraphs (j), (k), (l), (m), and (n)  
of Finding 18.

j) That the language of Subdivision 7 of the Articles  
of Incorporation of Citizens Gas Company is that set  
forth in Finding 19.

503 k) That there was no provision in any of the trust  
instruments authorizing Citizens Gas Company to be-  
come the lessee of a competing gas property (Finding 20).

l) That plaintiff and all the holders of the bonds of The  
Indianapolis Gas Company either

i) Had actual knowledge of, or

ii) Were bound in law by knowledge of the matters  
and things set forth in Finding 21.

m) That the trust res, the subject of said public chari-  
table trust, did not include any part of the property of  
The Indianapolis Gas Company or any lease on any part  
of said property (Finding 22).

n) That the specific terms of the Lease are those set



forth in Finding 23, particularly those set forth in Subdivisions (d), (e), (h), and (j) of said Finding 23.

o) That no ordinance or resolution was ever adopted by the Common Council or Board of Public Works of the City of Indianapolis

- i) Authorizing the execution of the Lease,
- ii) Ratifying the Lease, or
- iii) Agreeing to be bound by the terms of the Lease (Finding 26).

p) That no action has even been taken by the Board of Trustees or the Board of Directors of the Department of Utilities of the City of Indianapolis

- i) Authorizing the acceptance of an assignment of the Lease,
- ii) Ratifying the Lease, or
- iii) Agreeing to be bound by the terms of the Lease (Finding 27).

504 q) That

i) The adoption of resolutions declining to accept an assignment of the Lease,

ii) The recording of such resolutions in the Recorder's office, and

iii) The service of a copy of said resolutions on Citizens Gas Company and The Indianapolis Gas Company, or any one or more of said events, occurred at the same time as the delivery of the assignment of the Lease by Citizens Gas Company to the City, the acceptance of such assignment by the City, and the recording of such assignment by the City in the Recorder's Office of Marion County, Indiana (Finding 28).

r) That prior to September 9, 1935, all of the conditions fixed in its Articles of Incorporation and the Franchise Contract as precedent to the duty and authority of Citizens Gas Company to convey and transfer its property to the City had been fully and completely performed (Finding 30).

s) That on September 9, 1935, nothing further remained to be performed or done by the City of Indianapolis to entitle it to have all of the Citizens Gas property conveyed and transferred to it (Finding 30).

t) That Citizens Gas Company has no property at this time (Finding 32).

u) That the Citizens Gas Company, in making the conveyance and transfer of its property to the City, "fully and completely performed and exhausted all of the duties,

powers and authority of Citizens Gas Company as initial trustee of the said public charitable trust." (Finding 33.)

505 v) That after September 9, 1935, neither Citizens Gas Company nor its directors, trustees, or officers had "any further duties, powers or authority as initial trustee of the said public charitable trust, or to hold, own, lease, manage or operate any property or business of any nature whatsoever" (Finding 33).

w) That there is no evidence that Joseph B. Keeling, the Corporation Counsel for the City, had any power or authority to bind the City in respect of the Lease or the approval of the Lease by the Public Service Commission (Finding 36).

x) That no controversy had ever arisen or existed in connection with the validity or invalidity of the Lease prior to July, 1935 (Finding 37).

y) That at the time when the Public Service Commission of Indiana approved the execution of the Lease no claim had been asserted that the Franchise Contract of 1905 and other related papers resulted in the creation of a public charitable trust (Finding 38).

z) That Fishback did not intervene or resist the approval of the Lease by the Public Service Commission as a beneficiary of the public charitable trust (Finding 38).

aa) That Fishback, when he sued in the Superior Court of Marion County, Indiana, sued merely as a stockholder of Citizens Gas Company and a resident freeholder of the City of Indianapolis and not as a beneficiary of the public charitable trust (Finding 39).

bb) That Citizens Gas Company and the City were not made parties defendant to the *Fishback* case as the initial and successor trustees of the public charitable 506 trust, "but were parties defendant in their individual capacity" (Finding 39).

cc) That there was no averment in the complaint filed by Fishback that a public charitable trust had been created by the Franchise Contract of 1905 (Finding 39).

dd) That the City was dismissed as a party defendant to the *Fishback* case prior to the entry of a final judgment therein (Finding 39).

ee) That at the date of the final disposition of the *Fishback* case there was neither an existing controversy nor the ripening seeds of a controversy between The Indianapolis Gas Company, the trustees of its mortgage, or its bondholders, and the City as to the enforceability of

the Lease against the City or the trust property (Finding 39).

ff) That up to the date when Fishback dismissed his cause against the City no issue had been presented between the City and The Indianapolis Gas Company as to the validity of the Lease (Finding 39).

gg) That there was neither in issue nor decided by the court in the *Fishback* case any question as to the validity or enforceability of the Lease against the City (Finding 39).

mm) That the *Fishback* case was tried and decided on the theory that whether the Lease was valid for its entire term or not, the action of the Public Service Commission of Indiana in approving the Lease could not be vacated or set aside (Finding 39).

ii) That new facts have occurred since the determination of the *Fishback* case which alter the legal rights and relations of the parties thereto (Finding 39).

507 jj) That the transfer of the trust res to the City as successor trustee on September 9, 1935, constituted such a new fact since the determination of the *Fishback* case as to alter the legal rights and relations of the parties to said case (Finding 39).

kk) That neither a controversy as to the enforceability of the Lease against the City nor the ripening seeds of such a controversy existed at any time prior to the date of the final disposition of the *Williams* case, between the City and The Indianapolis Gas Company or its mortgage trustees or bondholders (Finding 40).

ll) That none of the questions involved in the present case were actually litigated in the *Williams* case (Finding 40).

mm) That none of the questions involved in the present case could have been litigated under the issues in the *Williams* case (Finding 40).

nn) That no issue was made in the *Williams* case between The Indianapolis Gas Company, its mortgage trustees, or its bondholders, and the City or the Board of Trustees or the Board of Directors of the Department of Utilities in connection with the enforceability of the Lease against the City (Finding 40).

oo) That The Indianapolis Gas Company delivered certain bonds to the Citizens Gas Company "for the purpose of reimbursing Citizens Gas Company for eighty-five per cent (85%) of its capital expenditures on account of extensions and betterments to the plant and system of

The Indianapolis Gas Company made and paid for by Citizens Gas Company" (Finding 41).

508 That it was many years after the execution of the Lease before plaintiff received a copy of said Lease (Finding 41).

qq) That the evidence fails to show that any present owner of bonds of The Indianapolis Gas Company knew of, relied upon, or was in any manner influenced by the representations with reference to the Lease made between the years 1914 and 1935 in the sale of such bonds (Finding 44).

rr) That Halsey, Stuart & Company and Otis & Company were advised by the City and its representatives that the only authority which the City had in connection with the sale of its Gas Plant Revenue Bonds was to make a public offering and that the City had no authority to approve or become responsible for any representations made in connection with the resale of said Revenue Bonds by the purchasers thereof (Finding 47).

ss ~~ee~~) That the circulars and advertising issued by the purchasers of the City's Gas Plant Revenue Bonds were issued solely on their own authority and without authorization by the City (Finding 47).

tt) That "there is no evidence to show that any persons who purchased said Gas Plant Revenue Bonds of the City did so on the faith of any representation made by the City or its authorized agents" (Finding 47).

un) That any representations made by the purchasers of the City's Gas Plant Revenue Bonds were never ratified or approved by the City or any of its authorized representatives (Finding 47).

vv) That in making the payment of the common and preferred stock of Citizens Gas Company and the dividends thereon and the premiums on the retirement of 509 the preferred stock the City did not recognize directly or by implication the validity or enforceability against the City of the Lease (Finding 49).

ww) That The Indianapolis Gas Company was fully advised as early as July 23, 1935, that the City would not accept an assignment of the Lease (Finding 50).

xx) That there were agreements between the City and The Indianapolis Gas Company with respect to the operation of the gas producing and distributing plant and system of The Indianapolis Gas Company, "which agreements have been continuously in effect since September 9, 1935" (Finding 51).

yy) That the City has operated the gas producing and distributing plant and system of The Indianapolis Gas Company in pursuance of agreements between the City and The Indianapolis Gas Company (Finding 51).

zz) That there were agreements between the City and The Indianapolis Gas Company which provided in substance that the operation of The Indianapolis Gas Company plant and system by the City should not prejudice the rights of the City (Finding 51).

aaa) That the agreements referred to in Finding 51 as having "been continuously in effect since September 9, 1935," provided that the operation of The Indianapolis Gas Company plant and system by the City should not prejudice the City's rights (Finding 51).

bbb) That the agreements referred to in Finding 51 as having "been continuously in effect since September 9, 1935," provided that the City, by operating The Indianapolis Gas Company plant and system, did not recognize the validity of the Lease (Finding 51).

ccc) That "all payments made by the City of sums of money equal to the interest on The Indianapolis Gas Company bonds, dividends payable under the terms of the lease of September 30, 1913, or any of the monies now in escrow at The Indiana National Bank of Indianapolis, would not have been made in the absence of the agreement of March 2, 1936, for the temporary use of the property of The Indianapolis Gas Company, and certain correspondence exchanged between The Indianapolis Gas Company and attorneys for the City in connection with the payment so made" (Finding 56).

ddd) That in the contract of March 2, 1936, and the correspondence referred to in Finding 56 "it was agreed that neither the temporary operation of the property nor the payment of such monies by the City should in any way prejudice the City's rights" (Finding 56).

eee) That in the contract of March 2, 1936, and the correspondence referred to in Finding 56 it was agreed that neither the temporary operation of the property of The Indianapolis Gas Company nor the payment of the aforesaid monies should constitute an admission on the part of the City as to the validity or binding effect upon the City of the Lease (Finding 56).

fff) That the agreement of March 2, 1936, did not result in the default of interest payments due on the bonds of The Indianapolis Gas Company (Finding 56).

ggg) That in the absence of the agreement of March 2,

1936, "the City would not have made payments of sums equal to the interest" (Finding 56).

hhh) That the agreement of March 2, 1936, was not inimical to the interests of plaintiff or any of the bondholders whom it represents (Finding 56).

iii) That the plaintiff and two of the principal bondholders of The Indianapolis Gas Company were advised on March 11, 1936, of the terms of the agreement of March 2, 1936 (Finding 57).

jjj) That the plaintiff and two of the principal bondholders received and accepted the sum of \$171,000 with full knowledge of the terms of the agreement of March 2, 1936 (Finding 57).

kkk) That representatives of either

i) two of the principal bondholders of The Indianapolis Gas Company,

ii) The Massachusetts Mutual Life Insurance Company, or

iii) The New England Mutual Life Insurance Company, attended a meeting at the office of the Chase National Bank in New York City on April 10, 1936 (Finding 64).

lll) That an arrangement was made, either at the meeting of March 11, 1936 or at the meeting of April 10, 1936, by which the Chase National Bank would obtain an opinion from the law firm of Newton D. Baker, Esquire, either as to the validity of the Lease or its enforceability against the City of Indianapolis, or both (Finding 64).

31) In sustaining the objection of counsel for the City and refusing to admit in evidence Plaintiffs' Exhibit 135 for Identification, being the appellees' brief in the Supreme Court of Indiana in the case of *Allen G. Williams, appellant v. Citizens Gas Company of Indianapolis, et al., appellees*.

32) In admitting in evidence City' Exhibit 12, the minutes of a meeting of the Board of Directors for Utilities of the City of Indianapolis held on September 9, 1935 (being pages 178 to 236, inclusive, of the minute book of said Board of Directors).

33) In admitting in evidence each of the following exhibits offered by the City of Indianapolis, each of which exhibits was wholly irrelevant and immaterial to any issue in the case and constituted merely self-serving declarations on the part of the City of Indianapolis, its counsel, or Halsey, Stuart & Company:

a) City's Exhibits 28-A and 28-B, the letter of Janu-



ary 4, 1937, from Thompson, Rabb & Stevenson to Halsey, Stuart & Company.

b) City's Deposition Exhibit 2, the letter of September 25, 1935, from Thompson, Rabb & Stevenson to Halsey, Stuart & Company.

c) City's Deposition Exhibits 3 and 3-A, the letter of September 23, 1935, from Halsey, Stuart & Company to Mr. A. L. Rabb.

d) City's Deposition Exhibits 4 and 4-A, the letter of September 21, 1935, from Thompson, Rabb & Stevenson to R. E. Simond.

e) City's Deposition Exhibit 5, the letter of September 18, 1935, from R. E. Simond to Mr. Albert Rabb.

34) In sustaining the objection of the City's counsel to the following question asked by plaintiff's counsel of the witness Gavin L. Payne:

"From your experience in the field of investment banking and particularly in the field of public utility securities, do you know how those manuals are made up?"

After the Court sustained said objection plaintiff's counsel made an offer of proof as follows:

"We offer to prove by the witness that the practice in making up these manuals is for the publishers of the manuals to send questionnaires to the various companies to receive that information from the companies and that the information, contained in the manuals, as made up from the information received from the various companies upon which the reports are made."

35) In admitting in evidence City's Deposition Exhibit 1, said exhibit being entitled "Memorandum Re: 99 Year Lease from Indianapolis Gas Company to Citizens Gas Company."

Wherefore, for each and all of the errors of the District Court enumerated in the foregoing Statement of Points plaintiff-appellant prays that said final decision of the District Court entered on the 21st day of September, 1939 be reversed; that the Circuit Court of Appeals enter an order granting plaintiff-appellant such relief prayed for in its bill of complaint as amended and supplemented as comes within the issues presented for determination, and denying defendants, the City of Indianapolis, et al., the relief prayed for in their counterclaim; or, in the alternative, that the Circuit Court of Appeals order and direct the District Court to enter a final order reversing its said final decision entered on the 21st day of September,



ber, 1939, granting plaintiff-appellant such relief prayed for in its bill of complaint as amended and supplemented as comes within the issues presented for determination, and denying defendants, the City of Indianapolis, et al., the relief prayed for in their counterclaim; and that it be granted such other and further relief as the Court shall deem proper.

Dated October 27, 1939.

William L. Taylor  
Howard F. Burns  
John Adams  
*Solicitors for Plaintiff*

514

**Acknowledgment of Service.**

Service of the foregoing "Statement of the Points on Which Plaintiff-Appellant Intends to Rely on Appeal" and receipt of a copy of said Statement of Points is hereby acknowledged this 27 day of October, 1939.

Edward H. Knight,  
*Corporation Counsel of Indianapolis.*  
W. H. Thompson,  
Patrick J. Smith,  
*Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of the City of Indianapolis.*

Louis B. Fwbank,  
Wm. R. Higgins,  
*Solicitors for defendant, The Indianapolis Gas Company.*  
Davis, Pantzer, Baltzell & Sparks,  
William G. Sparks,  
*Solicitors for defendant, Citizens Gas Company of Indianapolis.*

Filed  
Nov. 16,  
1939.

1036 And afterwards towit at the November Term of said Court, on the 16th day of November, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now the defedant The Indianapolis Gas Company by its attorneys, and files notice of appeal to the United States Circuit Court of Appeals for the Seventh Circuit, which is as follows:

1037 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana.

Indianapolis Division.

The Chase National Bank of The City of New York, Trustee,	} In Equity, Cause No. 1844.
<i>Plaintiff.</i>	
<i>vs.</i>	
Citizens Gas Company of Indian- apolis, <i>et al.</i> ,	} Defendants.

# NOTICE OF APPEAL, BY DEFENDANT THE INDIANAPOLIS GAS COMPANY TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUT.

Notice is hereby given that The Indianapolis Gas Company, a defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment and decree entered in this cause on September 21, 1939.

Louis B. Ewbank,  
William R. Higgins,  
*Solicitors for Defendant-Appel-  
lant, The Indianapolis Gas  
Company.*

1061 (Further Entry for November 16, 1939.)

And said defendant also files bond an appeal in the sum of \$250.00, with the United States Fidelity and Guaranty Company as surety thereon, which bond is as follows:

1062 IN THE DISTRICT COURT OF THE UNITED STATES.

\* \* (Caption—1844) \* \*

Filed  
Nov. 16,  
1939.

**BOND ON APPEAL BY THE INDIANAPOLIS GAS COMPANY.**

Filed Nov. 16, 1939.

Know All Men By These Presents that we, the Indianapolis Gas Company, a corporation, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the Chase National Bank of the City of New York, Trustee, Citizens Gas Company of Indianapolis, a corporation, the City of Indianapolis, a municipal corporation, Thomas D. Sheerin, A. Dallas Hitz, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, and Henry L. Dithmer, Brodehurst, Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach, and John E. Ohleyer as members of the Board of Directors for Utilities of the City of Indianapolis (hereinafter referred to as the "obligees") in the full and just sum of Two Hundred Fifty ..... Dollars (\$250.00), to be paid to the said obligees, their heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Executed this 16th day of November, 1939.

The condition of this obligation is such that:

Whereas, on the 21st day of September, 1939, in the above entitled action between the above named parties a judgment was rendered against the said defendant, The Indianapolis Gas Company, and said defendant has appealed to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, Therefore, if said The Indianapolis Gas Company

shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then the above obligation to be void; otherwise in full force and effect.

The Indianapolis Gas Company,

By: Arthur V. Brown,  
*Vice President.*

(Seal)

Attest:

Wm. J. Yule,

*Sect.*

The United States Fidelity and Guaranty  
Company of Baltimore, Maryland,

By: Martin B. Hall,

*its Attorney in fact.*

(Seal)

Sealed and Delivered in  
the presence of:

R. H. O'Hara,

J. Laudament.

1038 (Further Entry for November 16, 1939.)

Filed  
Nov. 16,  
1939. And said defendant also files its statement of points,  
which is as follows:

1039 IN THE DISTRICT COURT OF THE UNITED STATES.

\* \* (Caption—1844) \* \*

STATEMENT OF POINTS ON WHICH THE INDIANAPOLIS GAS COMPANY, DEFENDANT-APPELLANT INTENDS TO RELY ON ITS APPEAL.

Now comes The Indianapolis Gas Company, a defendant in the above entitled cause both to the complaint of plaintiff and to the counterclaim of each defendant, respectively, Citizens Gas Company of Indianapolis, and of City of Indianapolis, and individuals suing, respectively, as members of the Board of Trustees for Utilities and as members of the Board of Directors for Utilities of such City, and an appellant of the Circuit Court of Appeals, and in connection with its appeal files the following Statement of Points on which it intends to rely on its appeal to the Circuit Court of Appeals for the Seventh Circuit of the United States, from the final decision of the above named District Court entered on the 21st day of September, 1939.

The said District Court erred in each of the following respects:

1. The Court erred in decreeing that the lease dated September 30, 1913 from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is invalid and unenforceable against each:

(a) The City of Indianapolis

(b) The individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities for said City.

(c) The property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by said City through its Department of Utilities,

(d) The Citizens Gas Company of Indianapolis,

(e) The Indianapolis Gas Company.

2. The Court erred in decreeing that neither the order of the Public Service Commission of the State of Indiana approving the said lease nor the judgments in the cases of Frank S. Fishback *vs.* Public Service Commission of Indiana; and Allen G. Williams *vs.* Citizens Gas Company, et al., nor either of them are, *res adjudicata* of the validity and binding effect of said lease upon each of the following defendants:

(a) The City of Indianapolis

(b) The individual defendants-members of the Board of Trustees and Directors of the Department of Utilities of said City,

(c) The Citizens Gas Company of Indianapolis.

3. The Court erred in decreeing that the plaintiff below recover against this defendant-appellant the sum of \$1,032,150.00 together with interest thereon from date of judgment at the rate of six per cent per annum.

4. The Court erred in its conclusion of law that the City of Indianapolis was not estopped by any of its conduct from denying the validity and enforceability of the lease against it and the property, which had been formerly owned and operated by Citizens Gas Company of Indianapolis, which it had taken over on September 9, 1935.

5. The Court erred in its conclusion of law that the Citizens Gas Company of Indianapolis was not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

6. The Court erred in refusing to decree as a conclusion of law that the City of Indianapolis and the individual

members of the Board of Trustees and Board of Directors for Utilities of said City, were precluded by laches from denying the validity and enforceability of the lease against said City and the individual defendants and the property formerly owned and operated by Citizens Gas Company of Indianapolis which it had taken over on September 9, 1935.

7. The Court erred in refusing to decree as a conclusion of law that the Citizens Gas Company of Indianapolis was precluded by laches from denying the validity and enforceability of the lease against it.

8. The Court erred in its conclusion of law that the Citizens Gas Company of Indianapolis was completely released of all present and future obligations and liabilities under said lease by the conveyance and assignment to the City of Indianapolis on September 9, 1935, of all its property and assets.

9. The Court erred in refusing to decree as a conclusion of law that by reason of the fact that the City 1042 took over all the assets of the Citizens Gas Company and that the sole consideration therefor was paid by it directly to the stockholders and bondholders of said company, leaving it without assets with which to satisfy its obligations, the City and the property taken over by it from the Citizens Gas Company of Indianapolis is now obligated to pay all liabilities of the Citizens Gas Company including those arising under said lease.

10. The Court erred in refusing to decree as a conclusion of law that by the provisions of the lease, all obligations of the Indianapolis Gas Company to its bondholders for payment of interest had been assumed and expressly undertaken by Citizens Gas Company and its successors and assigns.

11. The Court erred in refusing to decree as a conclusion of law that the obligation to satisfy such judgment as might properly be entered in the cause is that of the City of Indianapolis and the public charitable trust it is administering and the Citizens Gas Company as principals, and the sole obligation of the Indianapolis Gas Company, is that of a surety.

12. The Court erred in refusing to decree as a conclusion of law that the defendants below should be held liable for any judgment entered in the cause in the following order:

First: The City of Indianapolis and the property of

the public charitable trust received by said City from Citizens Gas Company,

Second: The Citizens Gas Company of Indianapolis, and

Third: The Indianapolis Gas Company.

1043 (As To erroneous "Special Findings of Facts".)

13. The Court erred in its Findings of Fact Nos. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 30, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51 and 56, as hereinafter specifically referred to, each of which parts of said Special Findings of Facts is

- i) wholly unsupported by the evidence.
- ii) contrary to the manifest weight of the evidence.
- iii) states an inference or conclusion which is wholly unsupported by the evidence, and

iv) states an inference or conclusion that is contrary to law and is wholly unwarranted as a matter of law.

Each of the parts of findings hereinafter referred to is objected to on each of the four grounds just stated above, and each of said grounds is relied upon as a separate and distinct point as to each part of said findings hereinafter enumerated.

The District Court erred in finding:

(a) That the purposes and obligations of Citizens Gas Company of Indianapolis were and are fixed and controlled entirely by its original and amended Articles of Incorporation, as amended, and its by-laws and the franchise ordinance and contract between the City of Indianapolis and said company's assignors, now in evidence as Plaintiff's Exhibit one (1), as copied in the stipulation of the parties offered in evidence. (Finding 14.)

(b) That all the rights, property and assets owned and acquired by the defendant counterclaimant, Citizens Gas Company, were held by it as the initial trustee of a public charitable trust for the benefit of present and prospective gas consumers of the City of Indianapolis, and for 1044 the purposes and upon the terms and conditions set forth in said instruments as set out in plaintiff's Exhibit one (1) with the stipulation of the parties, and the enactment providing for the incorporation of manufacturing and mining companies, for no other purpose and on no other terms and conditions. (Finding 15.)

(c) That the sole purpose and object of the creation, organization and existence of the Citizens Gas Company was to act and perform the duties of initial trustee of said public charitable trust, as specifically set forth in said



instruments and enactment contained in the stipulation of the parties as plaintiffs, Exhibit one. (Finding 16.)

(d) That said Citizens Gas Company had no power or authority as a corporation to act otherwise than to act and perform the duties of initial trustee of a public charitable trust as specifically set forth in the said instruments and enactment as contained in the stipulation of the parties as Plaintiff's Exhibit one (Finding 16).

(e) That the settlers of the public charitable trust were (only) the public-spirited citizens who subscribed for stock of Citizens Gas Company (Finding 17a).

(f) That the beneficiaries of the said public charitable trust were (only) the then and future gas users of Indianapolis (Finding 17b).

(g) That Citizens Gas Company was a trustee "with a definitely fixed and limited term of trusteeship" (Finding 17c).

1045 (h) That the City of Indianapolis was the successor of Citizens Gas Company as trustee of said public charitable trust, and is the present trustee (Finding 17d).

(i) That "the trust res was the property and plant of Citizens Gas Company, being the property formerly owned by the Consumers Gas Trust Company" (Finding 17e).

(j) That the franchise contract "creating the public charitable trust" required the "articles of Incorporation" of an Indiana Corporation which the individual grantees were to organize to which the franchise should be assigned, to "provide" anything at all other than what the statute (Acts 1905, p. 434, ch. 139, §1) directed to be written therein (Finding 18).

(k) That anything recited in the court's finding as what the Citizens Gas Company's "articles of Incorporation should provide" because of any stipulations in the city "franchise contract" constituted any part of such articles or of that company's charter, or in any way defined or limited its corporate powers, except only the provisions therein that

(a) the capital stock to be not less than \$1,000,000; and that

(h) the business and prudential affairs are to be managed by a Board of nine Directors; and that

(j) the company to be organized shall secure, acquire or construct and put in operation a fuel gas plant;

which the statute (Acts 1905, p. 434, ch. 139, §1) commands to be written therein (Finding 18).

(l) That except only as to the provisions as to 1046 capital stock, directors and business of supplying "light, heat and power" . . . "to the City of Indianapolis" and the term of existence of "50 years" for which the statute provided, any other of said provisions written into the Articles of Incorporation of Citizens Gas Company, or stipulated by the franchise contract of its assignors with the City of Indianapolis to be provided therein, operated or could operate in any way to limit the power of such company to make contracts within its statutory powers then possessed or afterward conferred, or that they in any way took away or limited said company's liability under the contracts which it did execute within its statutory powers as a public utility corporation to furnish light, heat and power to a "city". (Finding 18)

(m) That the franchise contract between the City of Indianapolis and those who afterward assigned it to Citizens Gas Company, providing that the company which they should incorporate and to which they should assign the franchise should include provisions in its Articles of Association not commanded by the Statute (Acts 1905, p. 434, supra), could make any such thing written therein to constitute lawful provisions of such articles; more especially could so make what the court has lettered as follows:

(i) that the stockholders should be repaid their investment with 10% per annum, although that amount had not been earned and the company should be left with unperformed obligations;

(j) that the franchise was conditioned on the company acquiring title to an existing gas fuel plant with not less than 100 miles of mains;

1047 (l) limiting the price which should ever be charged the consumer for gas to 60 cents per thousand cubic feet under penalty of the franchise becoming void. (Finding 18)

(u) That any provision which the City of Indianapolis may have written into a franchise contract with individuals as to what should be contained in the Articles of Incorporation of a corporation which such individuals thereby agreed to organize to which they agreed to convey the franchise, other than the six things which the

statute authorized and commanded to be expressed therein (Acts 1905, p. 434, supra), controlled or in any degree limited the corporation, when organized, in the exercise of its statutory powers in making contracts with third persons as authorized by law. (Finding 18)

(o) That anything written into the "Articles of Incorporation adopted by Citizens Gas Company" reciting the "essential provisions required by the Franchise Contract" between that company's assignors and the City of Indianapolis, different from or in excess of the six things commanded by the statute (Acts 1905, p. 434, supra) to be contained in the Articles of a corporation for supplying light, heat and power to the city and its inhabitants; to wit, besides (1) the corporate name, (2) the object of incorporation, (3) the amount of stock, (4) the term of existence, (5) the number and names of directors, and (6) its principal place of business; either did or could constitute any lawful part of such Articles of Incorporation, or amount to anything more than a private contract between the stockholders among themselves and by them with the City of Indianapolis (Finding 19).

(p) That either the franchise contract of the City of Indianapolis with individuals who assigned it to Citizens Gas Company (especially the last ten lines of subdivision (d) the court partly quotes) or the Articles of Incorporation of that company, in Article VII or elsewhere, or purported to contain the provision which the court's finding says was "subdivision 7 of such articles" (Finding 19).

(q) That there was no provision in the "franchise" of Citizens Gas Company, until 1921, authorizing the execution of any mortgage, except one to be executed at the time of the transfer of the property to the city, if then necessary (Finding 20).

(r) That there was no provision in the instruments for the incorporation of Citizens Gas Company authorizing it "to become the lessee of a competing gas property" (Finding 20).

(s) That the "objects" of the Citizens Gas Company, or its duty, power and authority, included "to convey all the said property to the City of Indianapolis" "at the end of the period of franchise ordinance; to wit; on August 30, 1930" upon compliance with any "conditions fixed therein"; or that The Indianapolis Gas Company "had actual knowledge of, or were bound by law by knowledge of" such non-existent fact (Finding 21).

1049 (t) That upon "conveyance and transfer" of all of its "property to the City of Indianapolis" under the "terms and provisions of said instruments", the said franchise contract with said city and what was written into its own articles of association as therein provided, as construed with the law providing for the incorporation of manufacturing and mining companies, the Citizens Gas Company (incorporated for 50 years) was "to be wound up"; or that The Indianapolis Gas Company knew or was bound to know this non-existent fact (Finding 21).

(u) (1) That any "trust res" in any property of Citizens Gas Company was created or existed until after and except subject to the performance of all said company's obligations under its lease (Ex. B with complaint) of the gas plant and property of The Indianapolis Gas Company; or that with such lease unperformed Citizens Gas Company's conveyance of all it owned could vest any property in the City of Indianapolis upon any trust for itself or its inhabitants using gas, or for paying the stockholders dividends on their shares or repaying their investments (Finding 22).

(2) That on or after September 30, 1913, the "trust res" did not include any part of the property of The Indianapolis Gas Company or any lease on any part of such property. (Finding 22).

(v) (1) That the lease (Finding 19) contained the provisions as stated even so far as they purport to be quoted, because the "direct quotations" are incorrect except 1050 only (n) subdivision 22 and (a) the last rhetorical paragraph of subdivision 32 of the lease, but especially that such lease contained the specifications (b), (d), (h), (i), (j), (m) and (o). (Finding 23).

(2) And that the matters set out in the finding in the court's own words are a recital of the "provisions" that the lease contains. (Finding 23)

(w) That the City did not by ordinance or resolution of the Common Council or the Board of Public Works agree to be bound by the terms of the lease.

(x) That no action was ever taken by the Trustees or Directors of the Department of Utilities.

(1) authorizing acceptance of an assignment of the lease,

(2) ratifying the lease,

(3) agreeing to be bound by its terms (Finding 27).

(y) (1) That, prior to September 30, 1935, all of the conditions fixed in the said instruments (of agreement,

franchise and articles of association) and enactment (of statutes) as precedent to the duty and authority of Citizens Gas Company to convey and transfer the said property (to the city) had been fully and completely performed;

(2) That on said date nothing further remained to be performed or done by the City of Indianapolis to entitle it in law to have all of said property conveyed and transferred to it;

(3) That on said date Citizens Gas Company by its proper corporate officers, executed and delivered instruments of conveyance and transfer of all of the 1051 said property to the City of Indianapolis, in the manner and form and in strict compliance with its duty and authority so to do. (Finding 30)

(z) (1) That since September 9, 1935, the City has operated the gas producing and distributing plant and system of Citizens Gas Company "as trustee of the Public Charitable Trust created in 1905 and 1906".

(2) That since September 9, 1935, Citizens Gas Company has not been engaged in any business, and has no property at this time: (Finding 32)

(aa) That Citizens Gas Company, its Board of Directors, Voting Trustees and Officers, in making the conveyance, transfer and assignment of all its property to the City of Indianapolis, fully and completely performed and exhausted all of its duties, powers and authorities as initial trustee of said Public Charitable Trust. (Finding 33)

(bb) That neither Citizens Gas Company, nor its Board of Directors, Voting Trustees or any of its officers, from and after September 9, 1935, has any further duties, powers or authority to hold, own, lease, manage or operate any property or business whatsoever, or as initial trustee of said Public Charitable Trust. (Finding 33)

(cc) (1) That the issues tendered by the bill of complaint in the case of Newton Todd against Citizens Gas Company and others in the United States District Court for the Southern District of Indiana on April 30, 1929, were:

(a) That the original agreement between the City and Citizens Gas contained in the franchise contract of 1905 was abrogated and annulled when Citizens Gas Company surrendered the franchise and accepted an indeterminate permit.

1052 (b) That the surrender of the franchise and the acceptance of an indeterminate permit created a new contract between the State and Citizens Gas Company, one of the terms of which was that the City should have the right to acquire the property of Citizens Gas Company at a value to be determined by the Public Service Commission.

(c) That an Act of the Indiana General Assembly of 1929 purporting to legalize all provisions of the Articles of Association of Citizens Gas Company and particularly those in respect to the mode of acquiring the plant and property of Citizens Gas Company by the City, resulted in an impairment of the obligations of the contract above referred to in violation of the Constitutions of the State of Indiana and of the United States.

(d) That the franchise contract of 1905 merely gave an option to the City to purchase the property of Citizens Gas Company, and that this resulted in a violation of the rule against perpetuities. (Finding 37)

(cc) (2) That no controversy had ever arisen or existed in connection with the validity or invalidity of the lease prior to July, 1935.

(dd) That until the transfer of the trust res by Citizens Gas Company to the City, all payments required by the terms of said lease had been made as required therein and there had been no breach or threatened breach by Citizens Gas Company or its covenants under said lease, under the issues presented at this time for determination. (Finding 37)

(ee) That when the Public Service Commission of Indiana approved the execution of the lease, no claim had been asserted that the franchise contract of 1905 and other related papers resulted in the creation of a public charitable trust. (Finding 38)

(ff) (1) That Fishback, in his action in the Superior Court of Marion County, Indiana, against Citizens 1053 Gas Company and The Indianapolis Gas Company of the City of Indianapolis, and others, commenced November 28, 1913, sued as a stockholder of Citizens Gas Company and as a resident freeholder of the City of Indianapolis, and not as a beneficiary of a public charitable trust. (Finding 39)

(2) That Citizens Gas Company and the City were not made parties defendant as the initial and successor trustees of a public charitable trust, but are parties defendant in their individual capacity. (Finding 39.)



(gg) That there was neither in issue nor decided by the court in said Fishback case any question as to the validity or enforceability against the City of the lease. (Finding 39)

(hh) That since the determination of the Fishback case, new facts have occurred which alter the legal rights and relations of the parties, to wit—the transfer of the gas plant and property to the City on September 9, 1935. (Finding 39)

(ii) That none of the questions involved in this case were actually litigated in the case of Allen G. Williams against Citizens Gas Company, commenced on March 12, 1930, in the Superior Court of Marion County, Indiana, nor could such questions have been litigated under the issues in that case. (Finding 40)

(jj) That Citizens Gas Company has expended for additions and betterments to the plant of The Indianapolis Gas Company approximately \$200,000 for which it has received no reimbursement. (Finding 41)

1054 (kk) (1) That it was many years after the execution of the lease before the plaintiff in this action received a copy of the same. That there was any "predecessor trustee of the Chase National Bank", (only the same trustee whose name was changed by consolidation), etc. (Finding 41)

(2) That there is no proof that any predecessor trustee of the Chase National Bank which certified bonds either knew of the existence of the lease or relied upon it as a basis for a certification of any Indianapolis Gas Company Bonds.

(l) That from the period of its organization in 1906 to June 30, 1935, Citizens Gas Company paid dividends to the holders of its common stock at the rate of ten per cent per annum. (Finding 43)

(mm) (1) That it was "in accordance with the provisions of the franchise contract for 'the plants, property and assets of said (Citizens Gas) Company (to) be conveyed to said City of Indianapolis'", or that Citizens Gas Company on March 20, 1929, or April 3, 1929, or at any time, "was obligated to make such a conveyance." (Finding 45)

(2) That the circular and newspaper advertising issued by the purchasers of said revenue bonds were issued solely on their own authority and without authorization by the City; and that "any representations made by the purchasers of such bonds were never ratified or approved



by the City or any of its authorized representatives." Finding 47)

(nn) That Citizens Gas Company paid all the dividends on said preferred stock (of that company) 1055 up to the time of its redemption (on or about September 1, 1935); that "all of said common stock was retired". (Finding 48)

(oo) That Citizens Gas Company's mortgage on its gas plant and property had been executed in violation of the terms of any Public Charitable Trust. (Finding 49.)

(pp) That payment to holders of the common and preferred stock of Citizens Gas Company of the face value of their stock and dividends thereon out of or in exchange for that company's property without having performed that company's obligations under its contract for the lease of the gas plant and property of The Indianapolis Gas Company, and without making provision for such performance, was "in accordance with the decree of the United States District Court and the Circuit Court of Appeals in the Todd and Cotter cases". (Finding 49)

(qq) That City of Indianapolis was required to make payments to the stockholders of Citizens Gas Company of the face value of their respective shares of stock and unpaid dividends thereon before taking over the gas plant and property of that company as a trust res. (Finding 49)

(rr) That in taking over the gas plant and property of Citizens Gas Company upon payment to its common stockholders of the face value of their respective shares of stock with dividends at 10% per annum for two and one-half years past, so as to make a total reimbursement of all the money they had invested with 10% 1056 per annum income thereon for the total period of 30 years or less that it was invested, and to its preferred stockholders of the face value of their respective shares with dividends at 5% per annum for one year, so as to reimburse them for their total investment with cumulative dividends at 5% per annum for their total period of their investment, the City of Indianapolis did not "recognize" the enforceability against such City of the lease by that company of The Indianapolis Gas Company's property. (Finding 49)

(ss) That The Indianapolis Gas Company prior to September 9, 1935, was fully advised of the transfer to the City of Indianapolis of the plant and property of Citizens Gas Company, and "as early as July 23d, 1935,

was advised that the City would not accept an assignment of the lease." (Finding 50)

(tt) That agreements between the City and The Indianapolis Gas Company under which the City has operated the Gas producing and distributing plant and system of The Indianapolis Gas Company "have been continuously in effect since September 9, 1935." (Finding 51)

(uu) That any "correspondence" exchanged between The Indianapolis Gas Company and attorneys for the City before September 30, 1935, contained any agreement whatever by The Indianapolis Gas Company, or that the contract of March 22, 1936, stipulated as to the effect upon rights of the parties of anything which had already been done, as against the mere future effect of the circumstance that the City "may continue to operate the 1057 plant and equipment covered by said lease" and make certain payments, without such operation or the agreement or the payments constituting an admission by the City that the lease is valid or binding, and without the company's consent thereto or the execution of the agreement or acceptance of specified payments and consent to other payments by the City on the part of the company constituting any admission or estoppel of The Indianapolis Gas Company to insist that said lease is valid and binding. (Finding 56)

(vv) That in the contract of March 2, 1936, and any correspondence between The Indianapolis Gas Company and the City of Indianapolis "it was agreed that neither the temporary operation of the property (described in the lease) nor the payment of such monies by the City should in any way prejudice the City's rights." Finding 56)

The District Court also erred in the further following respects:

14. In stating as so-called "conclusions of law", the further findings that are not conclusions drawn from any findings of facts in the preceding paragraphs numbered one (1) to sixty-eight (68), inclusive, of the Court's "Special Findings of Facts", but each of which constitutes assertions of facts and of conclusions of facts as therein stated; which are numbered, respectively as "conclusions of law" No. five (5), No. six (6) and No. eight (8), as follows:

(ww) That "Citizens Gas Company, as initial trustee of a public charitable trust with a fixed date of expiration

of its trusteeship had no power or authority to execute a lease for 82 years beyond the expiration of its term of trusteeship which would be binding upon and enforceable against its successor trustee, the City." (Conclusion 5a)

(xx) That the trust instruments (written into the city franchise, and articles of incorporation, and by-laws of Citizens Gas Company; Finding 14 and 15) "properly construed precluded the initial trustee from executing such a lease." (Conclusion 5b)

(y.) That "the lease is not a valid and enforceable obligation against Citizens Gas Company." (Conclusion 6)

(zz) That Citizens Gas Company "was entirely and completely released and discharged from all present and future obligation and liability under said lease, by the conveyance, transfer and assignment of all its property and assets to the City on September 9, 1935. (Conclusion 6)

(&&) "That the plaintiff is entitled to judgment against the defendant, The Indianapolis Gas Company, in the sum of \$1,032,150.00 with interest thereon at the rate of 6% from the date of judgment" (Conclusion 8).

Wherefore, for each and all of the errors of the District Court enumerated in the foregoing statement of points, this defendant-appellant and counterclaim defendant-appellant prays that the final decision and judgment of the District Court entered on the 21st day of September, 1939, be reversed; that the Circuit Court of Appeals enter an order denying to the plaintiff the reliefs as against this defendant-appellant of the personal judgment for money prayed for in plaintiff's bill of complaint, as amended, and denying to each of the counter-claimants, Citizens Gas Company and the City of Indianapolis and individuals suing jointly with it, respectively, as members of the Board of Trustees for Utilities and as members of the Board of Directors for Utilities of said City, the relief prayed for in each of their said counterclaims; or in the alternative, that the Circuit Court of Appeals order and direct the District Court to enter a final order reversing its said final decision and judgment entered on the 21st day of September, 1939, and denying to the plaintiff, The Chase National Bank of New York, any personal judgment for money as against this defendant-appellant as prayed for in its bill of complaint,

as amended, and denying to each of the counter-claimants, Citizens Gas Company and the City of Indianapolis, et al., respectively, any and all relief as against this counterclaim defendant-appellant, prayed for in their respective counterclaims; and that this defendant-appellant also counterclaim defendant-appellant, The Indianapolis Gas Company, be granted such other and further relief as the Court shall deem just and proper.

Dated November ....., 1939.

Louis B. Ewbank,

William R. Higgins,

*Solicitors for Defendant-Appellant, The Indianapolis Gas Company.*

We hereby acknowledge service of "Statement of Points on which The Indianapolis Gas Company, defendant, appellant as to the Bill of Complaint and also as to each of the Counterclaims herein, intends to Rely on Appeal" and receipt of a copy of the same, this 15th day of November, 1939.

William L. Taylor,

Howard F. Burns,

*Solicitors for the Chase National Bank of the City of New York, Trustee.*

William H. Thompson,

Patrick J. Smith,

*Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees and the Board of Directors for Utilities of the City of Indianapolis.*

Paul Y. Davis,

William G. Sparks,

*Solicitors for Citizens Gas Company of Indianapolis.*

515 (Further Entry for October 28, 1939.)

Entered  
Oct. 28,  
1939.

It appearing to the Court that it is necessary and proper that the original exhibits hereinafter enumerated should be inspected by the United States Circuit Court of Appeals for the Seventh Circuit upon the appeal to said Court and that said original exhibits should be sent to said Circuit Court of Appeals in lieu of copies thereof;

It Is, Therefore, Ordered that the following exhibits be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, at Chicago, Illinois, and that, upon leave of said Circuit Court of Appeals on final determination of the appeal to said Court, said exhibits be returned to the Clerk of this Court:—

- (1) Plaintiff's Exhibit 2 for identification;
- (2) Plaintiff's Exhibit 3 for identification;
- (3) Plaintiff's Exhibits 89 to 94, inclusive, 95A, 96A, 97A, 98A, 99 to 110, inclusive, and 124;
- (4) Plaintiff's Exhibit 133, being the deposition of R. E. Simond and all the exhibits attached thereto;
- (5) Plaintiff's Exhibit 134, being the depositions of C. M. Clark and J. E. Baker and all the exhibits attached thereto;
- (6) Plaintiff's Exhibit 135 for identification, and
- (7) City's Exhibits 7A to 7E, inclusive, 7G, 10 and 11.

516 (Further Entry for October 28, 1939.)

And come also the parties by their respective attorneys, and file stipulations as to parts of record, proceedings and evidence to be included in the record on appeal, which stipulation is as follows:

517 IN THE DISTRICT COURT OF THE UNITED STATES.

\* \* (Caption—1844) \* \*

STIPULATION AS TO THE PARTS OF THE RECORD, PROCEEDINGS, AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL.

It is hereby stipulated by all the parties to this cause that the transcript of record on appeal in this cause shall include the papers and exhibits hereinafter enumerated,

and no other papers or exhibits, being the complete record and all the proceedings and evidence in this action, which papers and exhibits are hereby designated to be included in the record on appeal. This stipulation is made and entered into pursuant to the provisions of Rule 75 of the Federal Rules of Civil Procedure. The papers and exhibits hereby designated to be included in the record on appeal are as follows:

1. All the papers and exhibits enumerated in plaintiff's praecipe for transcript of record, filed November 27, 1937. The papers and exhibits so enumerated have been printed in their entirety in the transcript of record filed in the United States Circuit Court of Appeals for the Seventh Circuit in the case of The Chase National Bank of the City of New York, Trustee, plaintiff-appellant, *vs.* Citizens Gas Company of Indianapolis, et al., defendants-appellees, being case No. 6472 on the dockets of said Court, a copy of which transcript of record, marked "Exhibit A", 518 is filed with this stipulation. No other papers or exhibits appear in said transcript of record. The Clerk is, therefore, hereby requested to include a copy of said transcript of record in the transcript of record on appeal in this cause, as being a correct copy of all the papers and exhibits enumerated in plaintiff's said praecipe.

2. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in the case of The Chase National Bank of the City of New York, Trustee, plaintiff-appellant, *vs.* Citizens Gas Company of Indianapolis, et al., defendants-appellees, being case No. 6472 on the dockets of said Court.

3. The mandate of the United States Circuit Court of Appeals for the Seventh Circuit, filed October 24, 1938. Omit the detailed statement of costs and in lieu thereof insert:

"(Here follows the detailed statement of costs)".

4. The order of this Court entered on October 28, 1938.

5. The order of this Court entered on December 22, 1938.

6. The second amendment and supplement to plaintiff's bill of complaint, filed December 22, 1938.

7. The separate answer of The Indianapolis Gas Company to the second amendment and supplement to plaintiff's bill of complaint, filed January 10, 1939. Omit the acknowledgment of service and in lieu thereof insert:

"(Acknowledgment of service)".

8. The separate answer of Citizens Gas Company of

Indianapolis to the second amendment and supplement to plaintiff's bill of complaint, filed January 10, 1939. Omit the acknowledgment of service and in lieu thereof insert:

"(Acknowledgment of service)".

9. The separate answer of the City of Indianapolis, et al., to the second amendment and supplement to plaintiff's bill of complaint, filed January 11, 1939.

10. The order of this Court entered on January 14, 1939, permitting the withdrawal of plaintiff's answer to counterclaim of City of Indianapolis, et al.

11. Plaintiff's motion to strike immaterial matter from the answer and counterclaim of defendants, the City of Indianapolis, et al., filed January 14, 1939.

12. The order of this Court entered on January 14, 1939, overruling plaintiff's motion to strike.

13. The amendment and supplement to answering defendants' (City of Indianapolis, et al.) answer and counterclaim, filed January 18, 1939.

14. The order of this Court entered on January 18, 1939, designating certain issues to be tried and deferring the trial of all other issues.

15. The order of this Court entered on March 2, 1939, substituting new parties defendant.

16. The order of this Court entered on April 7, 1939.

17. The stipulation entitled "Approval of Exhibits", filed April 7, 1939. Omit signatures of counsel and in lieu thereof insert:

"(Here follow the signatures of counsel)".

18. The request of The Chase National Bank of the City of New York, Trustee, for findings of fact and conclusions of law, submitted May 4, 1939.

19. The request of the City of Indianapolis for findings of fact and conclusions of law submitted July 5, 1939.

20. The request of defendant, Citizens Gas Company of Indianapolis, for findings of fact and conclusions of law, submitted July 6, 1939.

21. The request of defendant, The Indianapolis Gas Company, for findings of fact and conclusions of law, submitted July 8, 1939.

22. The opinion of this Court, filed September 21, 1939.

23. The special findings of fact and the conclusions of law of this Court, filed September 21, 1939.

24. The order and final decree of this Court entered on September 21, 1939.



25. Plaintiff's notice of appeal.
26. Plaintiff's bond on appeal.
27. This stipulation.
28. Plaintiff's statement of the points on which it intends to rely on the appeal.
- 28½. Order To Send Up Original Exhibits.
29. The complete stenographic report of the proceedings at the trial on March 2nd, 3rd, and 4th, 1939.
30. The following exhibits offered by the plaintiff and received and read in evidence:  
Plaintiffs' Exhibit 1.  
Plaintiffs' Stipulation Exhibits 5 to 9, inclusive, 13, 14, 20, 22, 23, 24, 30, 31, 32, 35 to 40, inclusive, 47 to 50, inclusive, 55, 56, 58, 59, 66, 67, 75, 76, 86, and 87.  
Plaintiffs' Exhibits 8 to 94, inclusive, 95A, 96A, 97A, 98A, 99 to 132, inclusive, and 136 to 139, inclusive.
31. Plaintiffs' Exhibit 133, being the deposition of R. E. Simond and all the exhibits attached thereto.
32. Plaintiffs' Exhibit 134, being the deposition of C. M. Clark and J. E. Baker, and all the exhibits attached thereto.
33. Plaintiffs' Exhibit 135, which was excluded by the Court.
34. The following exhibits offered by the defendants, the City of Indianapolis, et al., and received and read in evidence:  
521 City's Stipulation Exhibits 60 to 65, inclusive, 68, 69, 70, and 77 to 85, inclusive.  
City's Exhibits C, 1 to 4, inclusive, 5A, 6A, 6B, 7A to 7E, inclusive, 7G, 8 to 11, inclusive, and 13 to 30, inclusive.
35. City's Exhibit B, being pages 358 to 362, inclusive, of the minute book of the Board of Directors for Utilities of the City of Indianapolis. Omit pages 358 to 361, inclusive, and in lieu thereof insert:  
"(Here appear (pp. 358-361) the contract of March 2, 1936 between the Department of Utilities of the City of Indianapolis and The Indianapolis Gas Company and a certified copy of a resolution adopted by the Board of Directors of The Indianapolis Gas Company ratifying said contract. A copy of said contract and of said resolution appears as Exhibit E to the answer and counterclaim of the City of Indianapolis, et al. (I R. 205-208))".
36. City's Exhibit 5B, being the answers of The Indianapolis Gas Company to the interrogatories propounded

to it by the City of Indianapolis, et al., including all the exhibits attached thereto, with the following exceptions:

(a) Omit the proof of service and in lieu thereof insert:

“(Here follows proof of service)”.

(b) Omit Exhibit 1 to the answers and in lieu thereof insert:

“(Here follows Exhibit 1, letter dated July 23, 1935 from Thompson, Rabb and Stevenson to The Indianapolis Gas Company, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 58)”.

(c) Omit Exhibits 6 to 34, inclusive, to the answers and in lieu thereof insert:

“(Exhibits 6 to 34, inclusive, to the answers of The Indianapolis Gas Company appear elsewhere in the record as follows:

522

Exhibit to  
Indianapolis Gas  
answers No

Appears in the Record as

6—Plaintiff's Exhibit 121.

7—Exhibit 4 to plaintiff's answers to interrogatories.

8—Exhibit 6 to plaintiff's answers to interrogatories.

9—Exhibit 7 to plaintiff's answers to interrogatories.

10—Exhibit 12 to plaintiff's answers to interrogatories.

11—Plaintiffs' Exhibit 111A.

11—Plaintiffs' Exhibit 111B.

12—Plaintiffs' Exhibit 112.

12—Plaintiffs' Exhibit 112A.

13—Plaintiffs' Exhibit 113.

14—Plaintiffs' Exhibit 114.

15—Plaintiffs' Exhibit 115.

16—Plaintiffs' Exhibit 116.

17—Plaintiffs' Exhibit 117.

18—Plaintiffs' Exhibit 118.

19—Plaintiffs' Exhibit 119.

20—Exhibit 29 to plaintiff's answers to interrogatories.

21—Exhibit 30 to plaintiff's answers to interrogatories.

22—City's Exhibit C.

23—Exhibit 32 to plaintiff's answers to interrogatories.

24—Exhibit 34 to plaintiff's answers to interrogatories.

25—Exhibit 35 to plaintiff's answers to interrogatories.

26—Exhibit 36 to plaintiff's answers to interrogatories.

27-34, inclusive—Exhibits 38-45, inclusive, to plaintiff's answers to interrogatories.

(Plaintiff's answers to the interrogatories propounded to it, and the exhibits thereto, are in evidence as City's Exhibit 6B.))"

523 37. City's Exhibit 12, being the minutes of a meeting of the Board of Directors for Utilities of the City of Indianapolis held on September 9, 1935 (pp. 178 to 236, inclusive, of the minute book), with the following exceptions:

(a) Omit pages 179 to 181, inclusive, and in lieu thereof insert:

"(Here follows (pp. 179-181) a certified copy of a resolution of the Board of Trustees of Citizens Gas Company adopted on September 9, 1935, a copy of which resolution is in evidence as Plaintiffs' Stipulation Exhibit 87))".

(b) Omit pages 185 to 187, inclusive, and in lieu thereof insert:

"(Here follows (pp. 185-7) a certified copy of a resolution of the Board of Directors of Citizens Gas Company adopted on September 9, 1935, a copy of which resolution is in evidence as Plaintiffs' Stipulation Exhibit 86))".

(c) Omit pages 188 and 189 and in lieu thereof insert:

"(Here follows (pp. 188-9) a form of indemnity agreement which is identical with the form of indemnity agreement actually executed, a copy of which appears as Exhibit J to the second amendment and supplement to plaintiff's bill of complaint))".

(d) Omit pages 191 and 192 and in lieu thereof insert:

"(Here follows (pp. 191-2) an executed copy of the Indemnity Agreement, a copy of which appears as Exhibit J to the second amendment and supplement to plaintiff's bill of complaint))".

(e) Omit pages 194 to 212, inclusive, and in lieu thereof insert:

"(Here follow copies of:

I. 'Deed of Conveyance of Real Estate' (pp. 194-7), a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 55.

II. 'Instrument of Transfer and Assignment of Personal Property' (pp. 198-204), a copy of which appears as Exhibit E to the bill of complaint (I R. 122-127).

III. 'Assignment of Lease' (pp. 205-8), a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 56.

524 IV. 'Assignment of Lease' (pp. 209-212), assigning the lease dated September 30, 1913 from The Indianapolis Gas Company to the Citizens Gas Company, a copy of which appears as Exhibit F to the bill of complaint (I R. 127-129))".

(f) Omit page 214 and in lieu thereof insert:

"(Here follows (p. 214) a copy of a letter, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 59))".

(g) Omit pages 216 to 218, inclusive, and the first 9 lines of page 219 and in lieu thereof insert:

"(Here follows (pp. 216-18, part of 219) 'Resolution for Rejection of Assignment of Lease', a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I R. 202-204))".

(h) Omit page 220 and in lieu thereof insert:

"(Here follows (p. 220) an executed copy of a document entitled 'Rejection of Assignment of Lease and Refusal to Assume, Take Over, or Be Bound Thereby', a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I R. 203-4))".

(i) Omit pages 223 to 225, inclusive, and in lieu thereof insert:

"(Here follows (pp. 223-5) 'Resolution for Temporary Use of Property of The Indianapolis Gas Company', a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I R. 200-202))".

38. The Indianapolis Gas Company's notice of appeal.

39. The Indianapolis Gas Company's bond on appeal.

40. The Indianapolis Gas Company's statement of the points on which it intends to rely on appeal.

41. The Clerk's certificate authenticating the transcript of record on appeal.

The Clerk is hereby requested to prepare said transcript of record for the appeal in this cause in accordance with the applicable statutes and rules of court and to file the same in the office of the Clerk of the United States Circuit Court of Appeals for the

*Certificate of Clerk.*

Seventh Circuit, at Chicago, Illinois, on or before the 20 day of November 1939.

Dated October 27, 1939.

William L. Taylor,  
Howard F. Burns,  
John Adams,

*Solicitors for plaintiff.*

Edward H. Knight,  
*Corporation Counsel of Indianapolis.*  
W. H. Thompson,  
Patrick J. Smith,

*Solicitors for the City of Indianapolis  
and the individual defendants who  
are members of the Board of Trustees  
or of the Board of Directors for  
Utilities of the City of Indianapolis.*

Louis B. Ewbank,  
Wm. R. Higgins,  
*Solicitors for defendant, The Indianapolis  
Gas Company.*

Davis, Pantzer, Baltzell &  
Sparks,  
William G. Sparks,  
*Solicitors for defendant, Citizens Gas  
Company of Indianapolis.*

1482 United States of America, }  
Southern District of Indiana, } ss:  
Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of The Chase National Bank of the City of New York, Trustee vs. Citizens Gas Company of Indianapolis, et al., No. 1844 In Equity, according to the Stipulation filed on October 28, 1939, now remaining among the records of said Court in my office.

I further certify that the original Official Reporter's Transcript of Proceedings upon the Trial filed on October 30, 1939, has been incorporated into said transcript.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 20th day of November, 1939.

Albert C. Sogemeier,  
*Clerk, United States District Court,  
Southern District of Indiana.*

(Seal)

United States of America, }  
Southern District of Indiana, } ss:  
Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the following are original exhibits in the case of *The Chase National Bank of the City of New York, Trustee vs. Citizens Gas Company of Indiana, et al.*, No. 1844 Equity, to be transmitted to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, in accordance with an order entered on October 28, 1939:

Plaintiff's Exhibit 2 for identification.

Plaintiff's Exhibit 3 for identification.

Plaintiff's Exhibits 89 to 94, inclusive, 95A, 96A, 97A, 98A, 99 to 110, inclusive, and 124.

Plaintiff's Exhibit 133, being the deposition of R. E. Simond and all the exhibits attached thereto.

Plaintiff's Exhibit 134, being the deposition of C. M. Clark and J. E. Baker and all the exhibits attached thereto.

Plaintiff's Exhibit 135 for identification.

City's Exhibits 7A to 7E, inclusive, 7G, 10 and 11.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 20th day of November, 1939.

Albert C. Sogemeier,  
*Clerk, United States District Court,  
Southern District of Indiana.*

(Seal)

"IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit,

No. 7143 and 7144.

The Chase National Bank of the City of New York,  
Trustee,

*Plaintiff-Appellant,*

*vs.*

Citizens Gas Company of Indianapolis, *et al.*,

*Defendants-Appellees.*

"Stipulation as to Printing of Record.

"It is hereby stipulated by all of the parties to this proceeding, in pursuance of the provision of Rule 21 (now

Rule 14) of this Court, that only parts of the transcript of record shall be printed and that the parts hereinafter stipulated to be printed are the only parts of the record material to the determination of the questions presented on this appeal.

"It is hereby stipulated that the Clerk shall print the entire transcript of record as received from the Clerk of the District Court, with the exception of the particular matters hereinafter specifically enumerated, to wit:

"(Here follows a detailed statement covering twenty-five pages indicating material to be omitted in the printing of the record.)

"Dated November 10th, 1939.

William L. Taylor,

Howard F. Burns,

John Adams,

*Solicitors for Plaintiff.*

Edward H. Knight,

*Corporation Counsel of Indianapolis.*

Michael B. Readington,

*City Attorney of Indianapolis.*

W. H. Thompson,

Patrick J. Smith,

*Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of the City of Indianapolis.*

Wm. R. Higgins,

Louis B. Ewbank,

*Solicitors for defendant, The Indianapolis Gas Company.*

Davis, Pantzer, Baltzell & Sparks,

by William G. Sparks,

*Solicitors for defendant, Citizens Gas Company of Indianapolis."*